Sara Lee d/b/a International Baking Company and Earthgrains *and* Freight, Parcel, Bakery, Dairy, Meat, Poultry and Factory Workers in the Los Angeles Metropolitan Area; General Truck Drivers, Warehousemen and Helpers Los Angeles, San Bernardino, Riverside Counties, California; Agricultural and Related Product Workers in the California Counties of San Diego, Imperial, Orange, Alameda, Los Angeles, San Bernardino, Ventura, Santa Barbara, Kern, San Luis Obispo, Tulare, Kings, Monterey, San Benito, Fresno and Merced, Local 63, International Brotherhood of Teamsters[1] and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 37, AFL–CIO, CLC and Martin Sanchez. Cases 21–CA–36154, 21–CA–36155, 21–CA–36491, 21–CA–36180, and 21–CA–36201

November 22, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 29, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent, the General Counsel, and the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 37, AFL–CIO, CLC (Local 37) filed exceptions and supporting briefs. The Respondent filed answering briefs to the Charging Party's and the General Counsel's exceptions and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified[4] and to adopt the recommended Order as modified and set forth in full below.[5]

We agree with the judge, for the reasons set forth in her decision, that the Respondent violated Section 8(a)(1) of the Act by interrogating employees, creating an impression of surveillance, threatening the outsourcing of work because of the Union, and threatening reprisals for union activity.[6]

However, we find merit in the Respondent's contention that the General Counsel's failure to amend the complaint to include the violations allegedly committed by Logistics Manager Jesse Medina precludes consideration of them here. Further, as explained below, we find, contrary to the judge, that: Supervisor Sara Dominguez did not impliedly threaten an employee that supporting the Union would harm the employee's pay and seniority; Supervisor Manuel Arteaga did not unlawfully equate voting for the Union with disloyalty to the Respondent; and Human Resources Director Irma Elioff did not impliedly promise to continue a flexible discipline policy if employees rejected the Union, or impliedly threaten employees with a strict discipline policy if they selected the Union.

Although we adopt the judge's finding that Elioff's statements to an employee at an unemployment hearing did not violate Section 8(a)(1), we do so for the reasons set forth below. Finally, as explained below, we adopt the judge's findings that the Respondent did not violate Section 8(a)(3) by warning and suspending employee Felipe Serrano for engaging in union activity,[7] or by suspending and discharging employee Maria Zarco.[8]

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[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by: threatening employees Martin Sanchez and Ruben Luna; threatening the likelihood of future union-called strikes and concomitant job loss if employees selected the Union; threatening the outsourcing of product delivery if employees selected the Union; and interrogating employee Sanchez. Further, there were no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by discharging employee Guadalupe Arteaga.

[3] The Respondent, the General Counsel, and Local 37 have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), Charging Party Local 37 was permitted to call to the Board's attention its recent decisions in *U-Haul Co. of California*, 347 NLRB No. 34 (2006), *Nordstrom, Inc.*, 347 NLRB No. 28 (2006), and *Longs Drug Store California, Inc.*, 347 NLRB No. 45 (2006).

[5] We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

[6] In adopting the judge's finding that Supervisor Arturo Arteaga unlawfully threatened employee Guadalupe Arteaga, Chairman Battista notes that the Respondent excepted to the judge's finding only on the basis of her credibility resolutions.

[7] We correct the judge's inadvertent error in stating that the Respondent discharged Serrano.

Because, as discussed below, we do not find that Supervisor Jesse Medina unlawfully warned employee Felipe Serrano not to invite other employees to a union meeting, we do not adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by including this incident in Serrano's final notice.

[8] We find, as discussed below, that Zarco's suspension and discharge did not violate Sec. 8(a)(1), (3), or (4) of the Act.

I. FINDINGS REGARDING SUPERVISOR JESSE MEDINA

The judge found, based on testimony elicited by the General Counsel at the hearing, that Logistics Manager Medina unlawfully interrogated employees concerning the Union, impliedly threatened employee Guadalupe Arteaga with unspecified reprisals, solicited employee Serrano to find out who supported the Union, and warned Serrano not to invite other employees to a union meeting, all in violation of Section 8(a)(1). Although none of these allegations was alleged in the complaint or added as amendments at the hearing, the judge nonetheless found Medina's conduct unlawful on the basis of her view that it was "closely connected" to the subject matter of other complaint allegations and was fully litigated.

The Respondent excepts, arguing that it had no notice that Medina's conduct was at issue. The Respondent contends that the General Counsel's failure to amend the complaint deprived the Respondent of notice that Medina's conduct was at issue, and prevented it from fully defending against these allegations. Although the Respondent acknowledges that it called Medina as a witness to testify, it contends that it did so to address matters specifically alleged in the complaint. The Respondent argues that it questioned Medina only briefly on some, but not all, of the issues involving the unalleged 8(a)(1) violations, and that it would have adduced comprehensive testimony from Medina on those issues had the General Counsel amended the complaint. We find merit in the Respondent's argument.

As noted above, the complaint did not allege that Medina engaged in any conduct violative of Section 8(a)(1). Although the complaint did allege several 8(a)(1) violations, those allegations were against other persons and were very precise. The complaint specifically identified the supervisors or agents who allegedly committed the unlawful acts, detailed when those acts allegedly occurred, and described the substance of those acts. The complaint listed 12 separate allegations of such misconduct by 5 supervisors or agents. Not a single one of these detailed complaint allegations named Medina as having committed any such act. Moreover, the General Counsel moved to amend the complaint on another matter at the hearing, but made no such motion with respect to any conduct allegedly engaged in by Medina. Nor did the General Counsel argue, in her brief to the judge, that Medina committed any violations. The Respondent, noting that the General Counsel had not amended its complaint with respect to Medina, stated in its brief to the judge that it would not address Medina's conduct. Despite this, the judge found that Medina's conduct violated the Act.

Due process requires that a party be on notice of the General Counsel's contentions. See generally *United Mine Workers (Frank Angle)*, 308 NLRB 1155, 1158 (1992). The Respondent, however, did not receive such notice. By virtue of the allegations in the complaint and amended complaint, and the position of the General Counsel at the hearing, the Respondent had no notice that Medina's conduct was in issue, until the judge, sua sponte, found these violations in her decision. In the circumstances of this case, with multiple allegations concerning conduct by various personnel, the Respondent was entitled to know, during the course of the litigation, what conduct the General Counsel contended was unlawful so that it could offer rebutting evidence. Here, the complaint does not mention Logistics Manager Medina, although it lists five other individuals, including one also with the last name of Medina, but who was not related to the logistics manager. The complaint distinctly lists the offending persons and the conduct in which those persons allegedly engaged. There is no apparent relationship between any of this conduct and that purportedly engaged in by Medina. Because the General Counsel failed to place the lawfulness of the statements attributed to Medina at issue, the Respondent was deprived of the opportunity to adequately address the questions.[9] We cannot conclude, therefore, that the issues involving Medina were fully and fairly litigated, and thus we cannot find that Medina's conduct violated the Act.[10]

II. THE ALLEGED 8(a)(1) STATEMENTS

The Respondent manufactures bakery products at its Vernon, California facility where it employed between 18–20 shipping and receiving employees and 11 delivery drivers. In 2002, Local 37 conducted a representation campaign among the Respondent's shipping and receiving employees, culminating in a Board-conducted representation election, which Local 37 lost. In early spring 2003, the Teamsters (the Union) commenced an organizational campaign among the Respondent's drivers.[11] The Union filed a representation petition in September and won the October 16 election by a vote of seven to four.

A. In September, Supervisor Sara Dominguez told employee Guadalupe Arteaga that "the Union wasn't a good thing. That it wasn't right. That [he] was one of the most senior drivers there with more time there."

[9] For example, as discussed above, the Respondent did not believe it was even necessary to address Medina's statements in its brief to the judge.

[10] See generally *Aljoma Lumber*, 345 NLRB No. 19, slip op. at 3 (2005) (allegation involving different individuals from those listed in complaint insufficiently related to warrant consideration).

[11] All dates hereafter refer to 2003, unless otherwise indicated.

Dominguez further told Arteaga that Arteaga was making decent money, that the Union would harm him, and that it would be better for him not to sign a union card.

The judge found that Dominguez impliedly threatened Arteaga with unspecified reprisals if he supported the Union. She found that the statements violated Section 8(a)(1) of the Act because they conveyed a message that union support would negatively impact Arteaga's seniority and pay.

We disagree, and find that Dominguez was merely expressing her lawful opinion concerning the effects of unionization on the employees.

Section 8(c) provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . ., if such expression contains no threat of reprisal or force or promise of benefit." "Intemperate" remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *Sears, Roebuck & Co.*, 305 NLRB 193 (1991).

We find that Dominguez' remark did not rise to the level of unlawful conduct. Dominguez' comments amounted to nothing more than an expression of her personal belief that Arteaga did not need the Union and would not benefit from it. Such a statement is no different in kind from one in which an employer lawfully tells employees there is no need to call a union in to resolve issues.[12]

For the same reason, we disagree with the judge that the Respondent violated Section 8(a)(1) when, 1 or 2 days before the election, Supervisor Manuel Arteaga admonished employee Martin Sanchez not to "do wrong by us" in the upcoming vote. The judge found the statement unlawful because, in her view, it equated loyalty to the Company with opposition to the Union and suggested that voting for the Union would "wrong" the Respondent.

We disagree. As explained above, Manuel Arteaga's statement urging Sanchez not to "do wrong by us" was a lawful expression of the supervisor's opinion on the disadvantages of unionism and did not impart a threatening meaning.[13]

B. Prior to the October election, the Respondent held three meetings with its drivers concerning the upcoming union election. At the meetings, Human Relations Director Elioff told employees that in the event they were even 5 minutes late getting to work "unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we end up with union grievances as a result of it."

The judge found that Elioff's statement carried with it both an implied promise (continuation of the current, presumably flexible, disciplinary approach if the drivers rejected the union) and an implied threat (conformity to strict disciplinary proceedings if the drivers chose union representation). Accordingly, she found that Elioff's statement regarding the potential impact of a contractual disciplinary procedure violated Section 8(a)(1). We disagree.

Generally, an employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc.*, 274 NLRB 377 (1985). An employer may lawfully tell its employees that its freedom to deal directly with them will be constrained if they choose union representation. This is especially so, where, as implied in Elioff's statements, the change would be as the result of a negotiated collective-bargaining agreement. The fact that such a statement might tend to discourage union support among employees who prefer to deal with their employer on an individual basis, does not render the statement unlawful.[14] Accordingly, we find that Elioff's remarks were protected under Section 8(c) of the Act and we shall dismiss this complaint allegation.

C. The Respondent discharged Guadalupe Arteaga on January 12, 2004.[15] Following his discharge, Guadalupe Arteaga filed for unemployment benefits with the State of California. Employee Felipe Serrano testified at the unemployment hearing in support of Guadalupe Arteaga. During her cross-examination of Serrano at the hearing, Human Resources Director Elioff asked Serrano if he was on "final warning status." According to Elioff, she asked the question essentially to show potential bias on Serrano's part.

The judge found that such a question could be viewed as a reminder to Serrano that he was on shaky discipli-

[12] See, e.g., *Howard Johnson Co.*, 242 NLRB 386 (1979) (telling employees that the company was convinced they did not need a union because it would "only make things more difficult for all of us" not violative, since it "merely sets forth [the employer's] views on the disadvantages of unionism and does not impart a threatening meaning").

[13] *Howard Johnson Co.*, supra.

[14] Elioff did not say that stricter discipline would be imposed under a union contract. She said that *if* there were a union contract calling for a certain *procedure*, and *if* the Respondent deviated from it, there *might* be a union grievance. Thus, our colleague vastly over-reads the statement.

Nor was there a promise of benefit. The Respondent was simply observing that the present regimen of flexibility would obtain if the Union lost the election.

[15] As noted above no party excepted to the judge's finding that the discharge did not violate Sec. 8(a)(3) of the Act.

nary grounds with the Respondent and that he had better be careful as to how he testified. The judge noted, however, that Elioff asserted that her intent was solely to bring to the unemployment judge's attention that Serrano arguably had reason to be disgruntled with the Respondent. Accordingly, she dismissed this allegation of the complaint.

The General Counsel excepts, contending that by relying on Elioff's subjective intent, the judge applied the wrong standard in evaluating the legality of Elioff's questioning of Serrano. We agree. The test for deciding whether a statement constitutes a threat of unspecified reprisal is whether it reasonably tends to coerce employees in the exercise of their statutory rights. See, e.g., *Exterior Systems*, 338 NLRB 677, 679 (2002). Applying that test here, we find that Elioff's asking Serrano whether he was on "final warning status" would not lead an employee reasonably to believe that he was being coerced, but rather that his credibility was being legitimately questioned. Moreover, we note that the question merely elicited an indisputable fact. Because Serrano was in fact on final warning status at the time of the unemployment proceeding and the Respondent had the right to establish this fact with reference to his credibility, Elioff's question was lawful. Accordingly, we find that Respondent did not violate Section 8(a)(1) by threatening Serrano.

III. SUSPENSION AND TERMINATION OF EMPLOYEE MARIA ZARCO

In 1994, the Respondent hired Maria Zarco. Employee Auria Chavez had requested that Sara Dominguez, a supervisor in the human resources office, hire Zarco, who was Chavez's sister. Then and later, Dominguez socialized with Chavez and other employees who described themselves as Zarco's sisters and Mexican nationals.

Zarco served as Local 37's observer at the election held in 2002. In August 2003, Zarco testified extensively in a Board unfair labor practice and objection hearing concerning that election.

All of the Respondent's employees, including Zarco, were required by Federal law to provide the Respondent with employment authorization documents. The Respondent maintained a "tickler" system designed to alert the human resources department monthly of work permits due to expire within 90 days so that the staff could remind employees to renew their permits. In January 2004, while reviewing the tickler files, Elioff noticed that Zarco's work permit was due to expire in 90 days. According to her regular business practice, Elioff reviewed Zarco's permit which listed Guatemala as her country of origin.[16] Believing Zarco to be from Mexico and not from Guatemala, Elioff decided to investigate.

Meanwhile, as described above, on January 12, 2004, the Respondent lawfully terminated Guadalupe Arteaga. The next day, employee Hector Magana, in the presence of Supervisor Manuel Arteaga, asked Zarco if she intended to support Guadalupe Arteaga in his expected protest against his discharge. Zarco answered that Guadalupe's assertions against Supervisor Arturo Arteaga were true. The following day, Elioff pointed out to Zarco the word "Guatemala" on Zarco's work permit and said "But we all know you are from Mexico." Zarco replied that she had "fixed" her papers like a lot of other people by saying that she was from Guatemala.[17] Elioff told Zarco not to tell her anything more that would require her to terminate Zarco. She suspended Zarco and told her to come back in a week with a letter from the Immigration and Naturalization Service (INS) correcting the error.

Later that day, Zarco wrote a letter supporting Guadalupe Arteaga's version of the events leading to his discharge. Subsequently, an assistant to Zarco's immigration lawyer sent the Respondent a letter referring to Zarco as a native of Guatemala but failing to address the accuracy of that information. Elioff told Zarco and her attorney that the letter was insufficient and that the Respondent required a letter from the INS rectifying the error on Zarco's work permit to correctly read that Zarco was from Mexico. No such letter was provided. On January 22, 2004, the Respondent terminated Zarco. Elioff told Zarco that the company attorneys had decided she should be fired and that the Respondent could not allow her to work knowing that her work permit was not legal.

The judge found that Zarco engaged in protected concerted activity when she testified at the 2002 Board hearing, that the Respondent knew of her protected concerted activity, and that Zarco had suffered an adverse employment action. The judge found, however, that the General Counsel did not establish the necessary motivational nexus between Zarco's protected concerted activity and the adverse employment action.[18] Accordingly, the judge concluded that the General Counsel failed to establish a prima facie case that the Respondent suspended and ter-

[16] Copies of Zarco's work permit from 1998–2004 showed the country of birth as Guatemala. Dominguez, who reviewed Zarco's previous work permits, testified she had previously failed to notice that Guatemala was named as the country of birth.

[17] A consequence of the Nicaraguan Adjustment and Central American Relief Act, 8 U.S.C. § 1101 (NACARA), was that certain Guatemalans were eligible for more favorable immigration treatment than Mexican citizens.

[18] *American Garden Management Co.*, 338 NLRB 644 (2002).

minated Zarco in violation of Section 8(a)(4) because she testified at a hearing before the Board.[19]

The judge then evaluated whether the suspension and discharge violated Section 8(a)(1). She found that although the suspension and the termination were not alleged as independent 8(a)(1) violations, the issue was fully litigated and the Respondent's defense would be the same as the one it put forth in the 8(a)(4) case.[20] The judge found that Zarco engaged in protected concerted activity when she wrote a supportive letter for Guadalupe Arteaga regarding his supervisor's conduct. The judge found, however, that the Respondent met its burden of establishing that it would have suspended and thereafter terminated Zarco even if she had not engaged in protected concerted activity. Accordingly, the judge found that Zarco's suspension and termination did not violate Section 8(a)(1) of the Act.

The General Counsel and Local 37 except to the judge's dismissal of the 8(a)(4) allegation and to the judge's failure to address the complaint's allegation that Zarco's suspension and termination violated Section 8(a)(3). As to the 8(a)(3) allegation, they contend that Zarco engaged in union activity when she acted as an observer for Local 37 in the 2002 election and testified for Local 37 at the Board hearing, that the Respondent had knowledge of Zarco's union activity, and that the Respondent's numerous 8(a)(1) violations established animus. The General Counsel and Local 37 further assert that in light of the Respondent's virulent and enduring antiunion campaign, the record amply demonstrates a nexus between Zarco's union activity and her discharge.

We agree with the General Counsel that the judge should have specifically considered the complaint's allegation that Zarco's suspension and discharge violated Section 8(a)(3) of the Act, but we find her omission to be nondeterminative. Thus, assuming arguendo that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by suspending and discharging Zarco, we find, as did the judge, that the Respondent met its burden of showing that it would have taken this action regardless of her protected activity, union activity, and participation in Board proceedings. That is, the Respondent met its burden of showing that it would have suspended and terminated Zarco for having an improper work permit. The Respondent established that it was responsible for seeing that Zarco possessed acceptable documentation of authorization for employment in the United States. Also, the apparent discrepancy in Zarco's country of origin was discovered in the regular course of Elioff's practice of reviewing work permits. As noted above, the Respondent consistently maintained a system to review work permits that were due to expire. Thus, after Zarco informed Elioff that she had "fixed" her papers to indicate that she had come from Guatemala rather than Mexico, the Respondent concluded, given an employer's burden of compliance under the Immigration Reform and Control Act of 1986, 8 U.S.C. **§** 1324 (IRCA), that it risked civil and/or criminal liability by retaining Zarco, whom it believed deceptively obtained work authorization. We therefore find that the Respondent established that it would have suspended and discharged Zarco even in the absence of her protected concerted activities.[21]

Although our dissenting colleague concedes that the Respondent could take some action with respect to Zarco, she challenges the discharge decision on the basis that it was "abrupt" and because it was "implausible" that an employer would discharge an employee so quickly in these circumstances. We do not agree. First, our colleague relies upon the discharge of Arteaga and the suspension of Serrano. However, as the dissent concedes, the judge found—and we agree—that these two incidents of adverse action did not violate the Act. Thus, the Respondent's lawful conduct with respect to these other employees does not establish that it was seeking to rid itself of union adherents or establish union animus. Nor do we find that the timing of the Respondent's discharge of Zarco was suspicious.[22] When the Respondent realized, in the regular course of its review of employee work permits, the apparent discrepancy between Zarco's soon-to-expire permit and its understanding of her home country, the Respondent informed Zarco precisely of what assurances it needed from her, and provided her adequate time to obtain counsel to resolve the issue. Although the dissent contends that there was insufficient time for Zarco to obtain a corrective letter, the record shows that the Respondent gave Zarco 8 days to obtain the letter, i.e., from January 14 to 22. Zarco never asked

[19] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[20] We find it unnecessary to decide whether the suspension and termination, considered as independent violations of Sec. 8(a)(1), were closely related to the complaint allegations and fully litigated because we conclude that, in any case, those actions were lawful.

[21] As the judge found, whether the Respondent was correct in its belief that it risked legal liability by retaining Zarco is not the issue before the Board. The issue is, rather, whether the Respondent violated the Act by terminating Zarco. That such a termination may not have been compelled by immigration laws does not convert the discharge here to a violation of the Act.

[22] Our colleague also attempts to link Zarco's discharge with an earlier case where the Board found that Elioff had unlawfully discharged an employee. Yet our colleague concedes that the Respondent did not violate the Act with respect to the other discharges here, and indeed agrees that there is no 8(a)(4) or (1) violation here.

for more time based on INS delay or any other reason. Further, it is well established that the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated.[23] Rather, the issue is whether the Respondent would have discharged Zarco absent her protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. mem. 127 F.3d 34 (5th Cir. 1997). There is nothing in the timing of the Respondent's dealing with Zarco that raises the inference of unlawful action.

As to the dissent's claim that it was "implausible" that the Respondent would have discharged a 10-year employee with a good work record, the judge specifically found "no evidence [that] Ms. Elioff ever accommodated or overlooked any work permit inconsistency, so as to permit an inference that she treated Ms. Zarco disparately." Clearly, the Respondent had a past practice of reviewing work permits when they were due to expire. It was in the normal course of this practice that Elioff discovered the inconsistency with regard to Zarco.[24]

Our dissenting colleague argues that the Respondent was not required to discharge Zarco. Again, the contention misses the mark. The issue, as noted above, is not what the Respondent was required to do. It is whether the Respondent would have taken the same action even if the employee had not engaged in protected activity.[25] As to that issue, the Respondent was reasonably concerned about the immigration status of Zarco. Zarco had lied on her application form and failed to correct the error through the appropriate authorities.

Our colleague also argues that the Respondent has shown no prior discharge for this activity viz lying on immigration documents and failing to correct this. But neither has the General Counsel shown that such actions by others has been tolerated. Further, it is not the law that an employer can prevail only by showing prior identical misconduct and discipline.

Finally, the fact that the Respondent indicated that Zarco had resigned does not establish a discriminatory motive for the discharge. It is not unusual for an employer to record that designation, even in a discharge situation.[26]

Accordingly, we shall dismiss these allegations.

ORDER

The National Labor Relations Board orders that the Respondent, Sara Lee d/b/a International Baking Company and Earthgrains, Vernon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their or other employees' union and other concerted, protected activities.

(b) Creating the impression of surveillance of employees' union activities.

(c) Impliedly threatening employees with reprisals if they continue to engage in union or other protected activities.

(d) Attributing the reason for possible outsourcing of work to employees' union or other concerted protected activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following the affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its plant in Vernon, California, copies of the attached notice marked "Appendix."[27] Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

[23] *Framan Mechanical, Inc.*, 343 NLRB 408, 417 (2004) (quoting *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993)).

[24] The record contains no evidence as to whether a similar situation had ever arisen at the Respondent's facility in the past. However, it is clear that Elioff had only recently begun reviewing the employees' work authorization cards, a job that had previously been performed by Sara Dominguez. Dominguez testified that during her yearly reviews of Zarco's cards she failed to notice that the cards named Guatemala as Zarco's country of origin.

[25] *Manno Electric*, supra.

[26] It does not follow that little weight should be given to an employer's statement of the *reason* for a discharge.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 22, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring in part and dissenting in part.

I would find one violation of Section 8(a)(1) in addition to those found by the majority.[1] The record establishes that the Respondent unlawfully threatened to follow a more rigid disciplinary procedure if employees acquired union representation. Further, given the totality of this record, I would find that the Respondent has not overcome the General Counsel's initial showing that the Respondent precipitously fired Zarco because of her union activity by establishing that it would have taken that action even in the absence of her union activity. Zarco's discharge therefore violated Section 8(a)(3).

[1] I agree with the majority that the violations found by the judge pertaining to Supervisor Jesse Medina were not sufficiently alleged, but only on the grounds that the General Counsel neither amended the complaint to include Medina's misconduct nor argued these violations at the hearing or in his brief to the judge, pursuant to Sec. 3(d); nor did the judge amend the complaint sua sponte at the hearing pursuant to Sec. 10(b). See *Rebel Coal*, 279 NLRB 141, 147 (1986); *GTE Automatic Electric*, 196 NLRB 902 (1972) (Sec. 10(b) authorizes judge to amend complaint when General Counsel consents "or where evidence has been received into the record without objection"). I note further that most of the Medina violations would have been cumulative of other violations.

I do not reach the complaint allegation that Supervisor Dominguez threatened Guadalupe Arteaga that the Union would affect him adversely because I find it cumulative of the unsupported prediction by Human Resources Director Elioff, discussed below, that a stricter disciplinary system would be imposed if the Union won the election, which I find was unlawful.

Similarly, I do not reach the complaint allegation that Supervisor Arteaga's exhortation to employee Martin Sanchez not to "do wrong by us" in the election was unlawfully coercive, because it was cumulative of the Respondent's other unlawful threats of reprisal.

Finally, I do not agree that the question the Respondent put to employee Felipe Serrano confirming his final-warning status while cross-examining him at an unemployment-insurance hearing had no reasonable tendency to be coercive. I agree, however, that in the setting of an administrative hearing the Respondent had the right to litigate its case and to elicit confirmation of an indisputable fact that had an arguable bearing on Serrano's credibility. For this reason, the question was not unlawful.

I. PREDICTION AND THREAT OF A STRICTER DISCIPLINARY PROCEDURE

On October 16, 2003, Teamsters Local 63 won an election to represent the Respondent's drivers. During the month preceding the election, the Respondent campaigned vigorously against the Union and, as the majority agrees, violated Section 8(a)(1) on multiple occasions.[2] The Respondent's human resources director, Irma Elioff, was one of the management speakers at meetings with employees on the subject of the election. Among other statements, Elioff told employees that if the unit was covered by a union contract and a driver arrived 5 minutes late for work, "unfortunately if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we might end up with union grievances as a result of it." The majority finds this to be no more than an accurate and lawful observation that under a union contract the Respondent would no longer be free to "deal directly" with employees.

However, Elioff's comment went far beyond indicating that the Respondent would be legally required to deal with the Union. Elioff clearly indicated that the disciplinary procedure in any union contract would preclude flexibility even to the point of requiring a driver who was "5 minutes late" to be disciplined, while under the Respondent's current policy the tardiness would be overlooked. Elioff stated no basis whatsoever for predicting the terms of a contract that did not exist, and her statement was therefore not a lawful prediction of the consequences of unionization. See *Systems West LLC*, 342 NLRB 851, 852 (2004) (employer stated no basis for its prediction that employees would not qualify as journeymen or receive journeyman's pay under union contract).[3] The judge was also correct that Elioff's statement was both an implicit promise that the Respondent would continue its current, purportedly more lenient policy if the Union lost the election and an implicit threat that it would impose discipline more strictly if the Union won.

[2] I agree with the majority that the Respondent unlawfully interrogated employees, created an impression of surveillance, threatened to outsource work if the Union won the election, and threatened employees with reprisal for union activity. Except for the violations of Sec. 8(a)(1) and (3) discussed herein, I agree with the dismissal of the other complaint allegations.

[3] See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Both the judge and I reject the claim that Elioff was "merely observing" that the Union could insist on the letter of its contract and therefore Elioff's statement was protected by Sec. 8(c). Under the majority's interpretation of Sec. 8(c), an employer lawfully may "observe" that any manner of strict discipline might befall employees as a result of the union's interpretation of its contract, no matter how unfounded or coercive the employer's speculation.

For all of these reasons, Elioff's statement violated Section 8(a)(1).

II. THE ZARCO DISCHARGE

I also dissent from the majority's finding that the discharge of Maria Zarco was lawful. The General Counsel showed that the Respondent acted with antiunion animus, and the Respondent failed to show that Zarco would have been discharged even if she had not engaged in union activity.

Maria Zarco was a 10-year employee with a good record. At the time of her discharge she worked in the Respondent's shipping and receiving department. Zarco was an observer for Bakery Workers Local 37 in a 2002 Board election in which that Union unsuccessfully attempted to organize that unit. Zarco also testified in support of the Union's election objections at a hearing in August 2003. On June 25, 2004, the Board upheld some of the Union's objections and found that the Respondent violated Sections 8(a)(1) and (3) in connection with the election.[4]

In October 2003, Teamsters Local 63 won an election to represent the facility's drivers. The Teamsters' victory and the Board's then-pending order for a new election in the shipping and receiving unit created the possibility that two important units at the Respondent's facility would soon be unionized.[5]

Under the Immigration Reform and Control Act of 1986 (IRCA), all of the Respondent's foreign-born employees were required to submit documentation, including employment authorization cards, on an annual basis demonstrating their eligibility for employment in the United States. The Respondent conducted a monthly review of those documents in order to identify authorization cards which were due to expire within 90 days. In January 2004, while assisting in this monthly review task, Elioff noticed that Zarco's workcard would expire within that timeframe and that it specified Guatemala as Zarco's country of origin. Based on her previous contacts with Zarco and other employees, Elioff believed that Zarco's true country of origin was Mexico.

Elioff called Zarco to her office on January 14, and pointed out the apparent discrepancy on her workcard. The judge credited Elioff's testimony that Zarco then admitted that from the time she had first applied for employment with the Respondent she had "fixed" her papers "like a lot of other people have" by specifying Guatemala as her country of origin.[6] Elioff immediately placed Zarco on suspension without pay and gave her "a week" to report the "error" on her workcard to the Bureau of Immigration and Customs Enforcement (ICE)[7] and obtain a written ICE confirmation that the error had been corrected.

Zarco contacted her immigration attorney, Alberto Salas, who wrote a letter to Elioff stating that Zarco had obviously satisfied the INS's requirements in order to obtain her workcard but that the Respondent had the right to verify the workcard's validity if it wished to do so. When Zarco delivered the letter to Elioff on January 19, Elioff again told her that she had to obtain a letter from ICE confirming the required correction of her workcard. With Zarco present, Elioff then called Salas and told him what she had told Zarco. Salas pointed out that Elioff could contact the INS if she doubted the veracity of Zarco's work authorization, and also suggested that a letter from the Respondent to ICE would cover the company's legal obligations. However, Elioff told Salas that Zarco would be fired for falsifying her documents because the company "could get into trouble." Elioff called Zarco 3 days later and discharged her, telling her that the "company attorneys" had decided she should be fired. However, Zarco's written termination notice, sent to her the same day, specified that the reason for termination was "Voluntary Resignation."

As the majority agrees, the judge should have analyzed the discharge under Section 8(a)(3) as well as under Section 8(a)(1) and (4), since that violation was also alleged in the complaint. Unlike the majority, however, I would find that the discharge violated Section 8(a)(3).[8]

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[4] *International Baking Co. & Earthgrains*, 342 NLRB 136 (2004), affd. 2006 WL 1737185 (9th Cir. 2006) (unpublished).

[5] In January 2004, within a space of 19 days, the Respondent discharged two prounion employees, including Zarco, and suspended a third for a week. However, there were no exceptions to the judge's findings that the other termination (of Guadalupe Arteaga) was lawful. I agree with the majority that the suspension and warning of Felipe Serrano was not shown to be unlawful. The adverse actions against the other two employees nevertheless constitute relevant circumstantial evidence in determining whether the Respondent acted with unlawful animus against Zarco, even if they were not proved to be independently unlawful.

[6] All of Zarco's previous workcards did in fact specify Guatemala as her country of origin. Under Federal law, certain individuals from Guatemala were eligible for more favorable immigration treatment than Mexican citizens.

[7] Before 2002, the enforcement component of the Immigration and Naturalization Service (INS) for the interior of the United States.

[8] I agree with the majority that the General Counsel did not establish a violation of Sec. 8(a)(4), because the judge found no evidence that the Respondent acted with animus against witnesses who had testified in the August 2003 Board proceeding. I also agree that Zarco's discharge was not shown to be an independent violation of Sec. 8(a)(1) in connection with a conversation she had with a supervisor the day before her suspension over whether she intended to write a letter in support of Guadalupe Arteaga, a union supporter who was discharged on January 12, 2004. As the judge found, Elioff was not shown to have known about that conversation before she fired Zarco.

The General Counsel clearly met his initial *Wright Line* burden of showing that the Respondent acted with antiunion animus.[9] The Respondent not only has a history of committing unfair labor practices, see *International Baking Co.*, supra,[10] but committed the additional violations found in this case just a few months before Zarco's discharge. Zarco was also closely associated with the Bakery Workers, having served as an observer for the Union in the 2002 election and as a witness for the Union at the 2003 Board hearing. The majority assumes arguendo that the General Counsel met his initial *Wright Line* burden, but bases its conclusion that the discharge was lawful solely on its finding that the Respondent showed that it would have discharged Zarco even if she had not engaged in protected activity. The majority, like the judge, essentially accepts the Respondent's contention that Zarco was terminated for falsifying her immigration documentation.

Because the judge's finding that Zarco admitted she had misstated her country of origin on her workcard was based on the crediting of Elioff's testimony over Zarco's, I accept that finding as fact.[11] Given the record as a whole, however, I do not agree that the Respondent has borne its burden of showing that Zarco would have been discharged so quickly for this infraction if she had not been a union activist. It is well established that undocumented workers are employees protected by the Act, even though they are not entitled to the remedy of backpay if they are discriminatorily fired.[12] It is also well settled that where the General Counsel has established that the Respondent acted with unlawful animus, the Respondent cannot simply cite a lawful rationale that might have been available at the time but must show that it was in fact motivated by that rationale.[13] In this sense, compliance with IRCA's statutory requirements is no different than any other lawful rationale for a discharge.[14] The Respondent was required to show that it would have abruptly fired Zarco based on her perceived noncompliance with IRCA even in the absence of her union activity. This it has failed to do.

First, the Respondent's written mischaracterization of Zarco as having voluntarily "resigned" when it is clear that she was fired undermines its contention that it acted out of fear of exposure to legal sanctions if Zarco were not discharged quickly. There was no reason for the Respondent to conceal either the nature of Zarco's separation or the true reason for it if it was in fact motivated by that fear.[15] Where a stated reason for an action is found to be pretextual, an inference is justified that the real motive was unlawful.[16]

Second, while infractions of IRCA cannot be condoned, it is implausible that in normal circumstances the Respondent would have discharged a 10-year employee with a good record as quickly as Zarco was terminated after the discovery of the violation. Elioff suspended Zarco without pay immediately upon confronting her with the purported discrepancy on her workcard, and in doing so clearly placed the Respondent in sufficient compliance with IRCA to avoid liability. Elioff could therefore have given Zarco more than a week either to obtain corrective documentation from ICE or to take other corrective steps before finally discharging her.[17]

[9] 251 NLRB 1083, 1089–1090 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[10] In fact, the judge in *International Baking Co. & Earthgrains*, supra, specifically found that Elioff acted with unlawful motive in selecting a union supporter for layoff in that case. 342 NLRB at 149.

[11] I note in passing, however, that the judge apparently did not discredit Zarco because of her demeanor but because of perceived oral and written "inconsistencies" in Zarco's testimony and her prehearing description of her first conversation with Elioff. These inconsistencies may not have justified the weight the judge chose to give them. Zarco's testimony that she did not understand what "error" on her workcard Elioff was referring to, even though Elioff pointed to the word "Guatemala," would have been plausible if Zarco was in fact from Guatemala and if Elioff (as Zarco testified) did not refer to Mexico in that conversation. And with respect to Zarco's failure to refer to certain statements by Elioff in the letter she wrote shortly afterward on behalf of Arteaga, the judge appears to have discredited Zarco because she did not write with the precision of an attorney.

[12] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 fn. 4 (2002); *Concrete Form Walls*, 346 NLRB No. 80, slip op. at 3–4 (2006).

[13] E.g., *Allen v. NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977); *Stemilt Growers*, 336 NLRB 987, 990 (2001); *Wright Line*, 251 NLRB at 1089.

[14] *Concrete Form Walls*, supra, 346 NLRB No. 80, slip op. at 3–6, citing *Sure-Tan v. NLRB*, 467 NLRB 883, 896 fn. 6 (1984).

[15] In the majority's view, "it is not unusual" for employers to record a discharge as a "resignation." To the extent this is accurate, it suggests that the Board should not give much weight to an employer's contemporaneous statement of the reason for a termination.

[16] E.g., *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Smucker Co.*, 341 NLRB 35, 40 (2004), enfd. 130 Fed.Appx. 596 (3d Cir. 2005); *Loudon Steel*, 340 NLRB 307, 312 (2003).

[17] One need not be an expert in Federal bureaucracy to question the assumption that Zarco could have obtained a notice of "correction" or any other written communication from the ICE within the space of a week. For example, employers and immigration attorneys alike have opposed a recent proposal by the Department of Homeland Security to require employers who receive "no-match" letters from the Social Security Administration (indicating a discrepancy between an employee's stated name and social security number) to get the discrepancy resolved within 60 days, on the partial ground that much more time would be needed. "Business, Unions Agree: DHS Should Abandon proposed Rule on SSA No-Match Letters," Daily Labor Report (Aug. 22, 2006). To recognize this reality is not to "substitute" any "business judgment" for the Respondent's or to dictate what the Respondent was "required to do." This reality is material in determining what actions the Respondent would have taken regarding an immigration discrepancy in the absence of Zarco's protected activity.

Instead Elioff informed Zarco's attorney only 5 days after her suspension that Zarco would be discharged, ignoring his suggestion that the Respondent satisfy its legal obligations by merely reporting the situation to ICE and thereby documenting its intention to comply with IRCA. Elioff apparently did not even discuss that suggestion with the Respondent's own attorneys. Accordingly, although the Respondent was concededly required to take some action upon discovering that Zarco was not authorized to work, it had no IRCA obligation to discharge her so quickly.[18]

Third, the Respondent has conspicuously failed to show how it would deal with, or had dealt with, similar cases in the past.[19] Again, while IRCA required the Respondent to take corrective action, IRCA did not dictate that Zarco be discharged only a few days after she was placed on unpaid suspension. The Respondent confirms in its brief that it employed a "significant number" of foreign nationals, and its management was therefore familiar with ICE's enforcement procedures. There is no dispute that, as the majority emphasizes, the Respondent had a practice of reviewing work permits that were due to expire. But the Respondent has not even contended that Zarco's treatment after Elioff reviewed her permit conformed to a preexisting policy or practice, let alone presented evidence of what that practice was.

The majority is correct that the mere possibility that Zarco's discharge was not "compelled" by IRCA "does not convert the discharge here to a violation of the Act." By the same token, however, neither does the mere possibility that a discharge might eventually be necessary under IRCA if Zarco took no corrective action to convert the precipitous discharge to a lawful action if it was motivated by antiunion animus. The fact that the Board must, like any other Federal agency, respect IRCA's requirements does not authorize an employer to use compliance with IRCA as a pretext for discrimination against employees who engage in Section 7 activity.[20] Because the Respondent failed to show that Zarco would have been treated in the same manner if she had not been a union supporter, her discharge violated Section 8(a)(3).

Dated, Washington, D.C. November 22, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their or other employees' union and other concerted, protected activities.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT impliedly threaten employees with reprisals if they continue to engage in union or other protected activities.

WE WILL NOT attribute the possible outsourcing of work to employees' union or other concerted, protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SARA LEE D/B/A INTERNATIONAL BAKING COMPANY AND EARTHGRAINS

Jean Libby and *Irma Hernandez, Esqs.*, for the General Counsel.

Timothy A. Davis and *Kimberley F. Seten, Esqs. (Constangy, Brooks & Smith, LLC)*, of Kansas City, Missouri, for the Respondent.

Amanda Lively (Wohlner, Kaplon, Phillips, Young & Cutler), of Sherman Oaks, California, for the Charging Party, Teamsters Local 63.

Guadalupe Palma, Esq. (Weinberg, Roger & Rosenfeld), of Alameda, California, for the Charging Party, Bakery Union

[18] This directly undercuts the Respondent's asserted motive for acting against Zarco with such haste. And as the majority agrees, the "issue" here is the Respondent's real motive—i.e., whether Zarco would have been treated in the same manner even if she had not been a union activist.

[19] Only after a respondent employer shows that it was enforcing a facially valid personnel procedure already in place, or at least was acting consistently with past practice, is the General Counsel required to show disparate enforcement. See, e.g., *Golub Corp.*, 338 NLRB 515, 516 (2002); *Baptist Medical Center*, 338 NLRB 346, 376 (2002).

[20] See *Concrete Form Walls*, supra, slip op. at 5 fn. 19 (even where employer reasonably believed discriminatees were unauthorized aliens, employer could not use their undocumented status as a pretext for discharge for their union activity).

Local 37.

Ruben Luna, Organizer, of Covina, California, for the Charging Party, Teamsters Local 63.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on April 4 through 7, and May 23, 2005,[1] upon second order consolidating cases, amended consolidated complaint, and amended notice of hearing (the complaint) issued December 15, 2004, by the Acting Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Wholesale and Retail Food Distribution, Teamsters Local 63 (Teamsters Local 63),[2] upon a charge filed by Bakery, Confectionery and Tobacco Workers and Grain Millers International Union, Bakery Union Local 37, AFL–CIO, CLC (Bakery Union Local 37), and upon a charge filed by Martin Sanchez (Sanchez), an individual. The complaint, as amended, alleges Sara Lee Bakery Group d/b/a International Baking Company and Earthgrains (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).[3] Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did Respondent engage in the following independent violations of Section 8(a)(1) of the Act: threaten employees with termination if they selected Teamsters Local 63 as their collective-bargaining representative; threaten employees with job loss if they voted for Teamsters Local 63 and in the event of a strike; threaten employees with unspecified reprisals if they engaged in protected activities; threaten to report employees to the Bureau of Citizenship and Immigration Service (formerly known as Immigration and Naturalization Service) in retaliation for engaging in protected activity; interrogate employees about their union activities; create the impression of surveillance of employees' union activities; threaten an employee with unspecified reprisals for having testified in support of another employee's unemployment insurance claim; and threaten to terminate an employee if he contacted a union representative?

2. Did Respondent violate Section 8(a)(3) and (1) of the Act by suspending and terminating Jose Guadalupe Arteaga on January 12?

3. Did Respondent violate Section 8(a)(1), (3), and (4) of the Act by suspending and terminating Maria Zarco on January 13 and 22, respectively?

4. Did Respondent violate Section 8(a)(3) and (1) of the Act by suspending and issuing a written warning to Felipe Serrano on January 29?

[1] All dates herein are 2004, unless otherwise specified. The hearing was continued from April 7 to May 23, 2005, to permit counsel for the General Counsel to procure the testimony of Alberto Salas.

[2] The full name of Teamsters Local 63 is set forth in the case caption.

[3] At the hearing, counsel for the General Counsel amended the complaint to include the January 29, 2004 suspension of Felipe Serrano as a violation of Sec. 8(a)(3) and (1) of the Act. Respondent denied the amended allegation.

III. JURISDICTION

Respondent, a Delaware corporation, with a facility located in Vernon, California (the Vernon facility) has at all relevant times been engaged in the manufacture, sale, and distribution of bakery products to commercial customers. During the 12-month period ending September 22, 2003, a representative period, Respondent annually sold and shipped goods valued in excess of $50,000 directly from its Vernon facility to customers located outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and Teamsters Local 63 and Bakery Union Local 37 have been a labor organizations within the meaning of Section 2(5) of the Act.[4]

IV. FINDINGS OF FACT

A. Alleged Independent Violations of Section 8(a)(1) of the Act

Respondent manufactures bakery products at its Vernon facility, where at all times relevant hereto, it employed 18–20 shipping and receiving employees and 11 delivery drivers. In 2002, Bakery Local 37 conducted a representation campaign among Respondent's shipping and receiving employees, culminating in a Board-conducted representation election, which Bakery Union Local 37 lost.[5] In the spring of 2003, Teamsters Local 63 commenced an organizational campaign among Respondent's drivers at the Vernon facility. Region 21 conducted a representation election among Respondent's drivers on October 16, 2003, which Teamsters Local 63 won by a vote of seven to four. Jose Guadalupe Arteaga (Guadalupe Arteaga or Guadalupe) and Felipe Serrano (Serrano) actively supported Teamsters Local 63 from nearly the inception of its campaign.

During the course of the campaign, the following exchanges occurred between supervisors and employees of Respondent:

1. Rigoberto Arteaga (aka Arturo Arteaga and herein Arturo Arteaga or Arturo), shipping and receiving supervisor:

According to Guadalupe Arteaga,[6] in September 2003, Arturo Arteaga asked Guadalupe if he was aware someone wanted to bring in a union and asked if Guadalupe had signed a union card because he knew seven drivers had. When Guadalupe denied signing, Arturo said he had been told one of the cards bore the last name of "Arteaga." Guadalupe said perhaps a temporary driver had used his name.

Two to 3 days later, Arturo told Guadalupe to tell him if he knew something about the union. Guadalupe denied any knowledge. Arturo said that maybe Guadalupe was even the president. Guadalupe answered that if Arturo continued to say that, he would talk to his supervisors upstairs. Arturo laughed. Thereafter, Arturo often referred to Guadalupe in front of other employees as "the president of the union."

On other occasions, Arturo instructed Guadalupe to tell him which employees had "voted" for the union, saying that even if

[4] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[5] The Board dismissed in part and sustained in part objections to that election. *International Baking Co. & Earthgrains*, 342 NLRB 136 (2004).

[6] Arturo Arteaga is not related to Guadalupe Arteaga.

employees had not signed, employees would have to leave.

Arturo Arteaga denied the above accusations. I credit Guadalupe Arteaga's account. His testimony was clear, consistent, and forthright.[7]

Sanchez testified that on several occasions prior to the election, Arturo Arteaga asked whom he was going to vote for and told him to be careful about his choice. On the day before the election, Arturo told Sanchez he knew whom he was going to vote for. On the day of the election, Arturo told Sanchez not to forget whom he was voting for. Arturo denied having such conversations with Sanchez. Sanchez' precomplaint affidavit to the Board does not mention any interrogation but states only that Arturo Arteaga told him to "be careful who you vote for."

Respondent terminated Sanchez in November 2003. Subsequently, Sanchez filed an unfair labor practice charge with the Board, which was thereafter dismissed. The potential bias created by this history, coupled with the discrepancies between Sanchez' affidavit and his assertions at the hearing, prevent me from crediting his testimony.

2. Sara Dominguez (Dominguez), Respondent's human resources supervisor:

According to Guadalupe Arteaga, after Arturo Arteaga first spoke to him, Dominguez called him to her office and asked if he knew something about the union. When Guadalupe Arteaga denied knowledge, Dominguez told him he was one of the most senior drivers and made decent money, that the union would harm him, and that it would be better for him not to sign a union card. When Guadalupe Arteaga again denied knowledge, Dominguez told him to think about it. Dominguez denied any such conversation but testified, somewhat equivocally, "No, I didn't ask because I already knew. They just—you couldn't talk to them. There was no change in their minds. I mean there was no reason to talk to them." I find Guadalupe Arteaga's testimony in this regard persuasive, and I credit his account.

3. Manuel Arteaga, shipping and receiving supervisor and brother of Arturo Arteaga:

According to Guadalupe Arteaga, sometime before the election, Manuel Arteaga asked Guadalupe and Sanchez if they knew which employees had signed union cards. They denied knowledge. Manuel Arteaga said that even if the union won an election, the drivers would leave, as he would hire the Schneider company to do their work.[8]

Two to 3 days later, Manuel Arteaga told Guadalupe that he knew who the leader of the union was. Guadalupe said that if they knew, they should stop calling him the president. Manuel Arteaga said he also knew who had signed cards.

At about the same time, Manual Arteaga, referring to the upcoming election, told Sanchez, "Don't do wrong by us."

Following the election, according to Guadalupe Arteaga, Manuel Arteaga told him he was certain he had voted for the Union. Guadalupe admitted doing so.

Manuel Arteaga denied talking to any employee about the union at any time. I did not find his denials convincing, and I do not credit them.

4. Jesse Medina (Medina), logistics manager:

As Respondent correctly points out, there is no complaint allegation that Jesse Medina's conduct violated the Act. Notwithstanding the General Counsel's presumably inadvertent omission, counsel for the General Counsel presented detailed evidence of Medina's allegedly unlawful statements, and Respondent called Medina to rebut the testimony. Therefore, I find the parties fully litigated this issue. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated [citations omitted]." *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 fn. 5 (2004). The issues regarding Medina's statements are inextricably connected to the timely alleged allegations of the complaint, involve the identical underlying legal theory and factual situation, and are subject to the same employer-raised defenses. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); *Precision Concrete*, 337 NLRB 211 (2001). Accordingly, I have considered whether Medina's statements violated Section 8(a)(1) of the Act.

According to Guadalupe Arteaga, Medina asked him if he knew anything about the union because he had a letter saying drivers had signed cards authorizing the union to represent them. Guadalupe denied knowledge. Medina said the union was not a good thing, and Guadalupe should tell the honest truth if he was involved. Guadalupe again denied involvement. Medina told Guadalupe that he knew he was comfortable in his job and that he should think about the union, as it was not a good thing.

Guadalupe Arteaga also testified that on another occasion as they rode together in a delivery truck, Medina asked him to report what he knew about the union and whether he was comfortable with his job. Guadalupe complained that Arturo Arteaga pressured him, yelled at him, gave him the worst jobs, called him names (i.e. "La Gorda," meaning the fat lady), and grabbed his private parts. Medina laughed. Guadalupe said it was not funny and reminded Medina that he had promised to fix those problems when Guadalupe had formerly complained of them. Medina said he would try to give Guadalupe a raise.

Driver Felipe Serrano (Serrano) testified that in early September, Medina asked him if he knew who organized the drivers. Serrano denied knowledge, but thereafter Medina continued to inquire and asked Serrano to find out who wanted the Union and who had signed authorization cards, saying he would keep the information confidential.

Although Medina, who no longer worked for Respondent at the time of the hearing, admitted that the topic of the union came up in conversations with employees, he denied telling any employee that he knew who had signed authorization cards. I find Guadalupe Arteaga and Serrano's testimony in this regard persuasive, and I credit their accounts.

[7] I consider few witnesses in this matter to have been fully candid or consistently reliable in all testimony. However, I need not refuse to accept everything a witness says because I do not believe all of it; "nothing is more common in all kinds of judicial decisions than to believe some and not all [that a witness says]." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951), cited with approval in *Daikichi Sushi*, 335 NLRB 622 (2001).

[8] Respondent did, in fact, subcontract its product delivery work sometime after the election. The General Counsel does not allege that the subcontracting violated the Act.

In September 2003, Serrano invited two drivers, Alfredo Garcia and Arturo Maravilla (Maravilla) to attend a union meeting. When the two declined, Serrano told them it was unfair for them to let union supporters do the work to obtain benefits they would later profit from. According to Serrano, both he and Maravilla used strong language but parted without further incident. A few days later, Medina told Serrano never to invite Garcia and Maravilla to a union meeting, as he could get into trouble if he did.

5. Rick Medina, safety director:[9]

In August 2004, Respondent received a customer complaint that one of Respondent's delivery drivers had knocked down a shed at the customer's facility. Upon reviewing the delivery schedule, Medina and Rick Medina identified the driver as Serrano. In the course of Respondent's investigation, while enroute to view the subject trailer, Serrano told Rick Medina he wanted to call his union representative to protest the company's reaching a conclusion without investigation. Serrano testified that Rick Medina told him if he called the Union, it could be grounds for termination. Fortuitously, Luna called Serrano on his cellular telephone at that moment. Serrano told Luna about the situation and asked if he wanted to speak to Rick Medina. After Rick Medina accepted the telephone, Serrano heard him say it was a bad connection and recite his office number. Serrano and Rick Medina went to the latter's office where Rick Medina accepted a phone call from Luna. I do not credit Serrano's testimony that Rick Medina told him calling the Union could be grounds for termination. It is improbable that after having made such a statement, Rick Medina would immediately engage in an apparently amicable conversation with Serrano's union representative. Moreover, there is no evidence Serrano told Luna of the threat, which one would expect had such a threat occurred. Following further investigation of the incident, Respondent issued Serrano a final warning, which the General Counsel did not allege violated the Act.

6. Irma Elioff:

Following his discharge, Guadalupe Arteaga filed for unemployment benefits with the State of California, Employment Development Department (EDD), which resulted in a hearing on April 5, before Administrative Law Judge Georgina Torres Rizk of the California Unemployment Insurance Appeals Board (the unemployment hearing). Serrano, inter alia, testified at the unemployment hearing on behalf of Guadalupe. In the course of cross-examination, Irma Elioff (Elioff), Respondent's human resources director, asked Serrano if he was, at the time of his testimony, in "final warning" status. According to Elioff, she asked the question essentially to show potential bias on Serrano's part.

7. Respondent's preelection meetings with drivers:

Prior to the October election, Respondent held three meetings with its drivers regarding the upcoming union vote. Elioff spoke at the meetings. Also present for Respondent were Arturo Arteaga, Dominguez, and Medina.

According to employee witnesses, at the first meeting, Elioff told employees there was nothing good about the Union, that it was losing membership and was always on strike, and that employees would lose if they voted for it, that unions go on strike, and if other companies went on strike, Respondent's drivers would have to join them and could be more easily fired. She told employees that Respondent could make its rules stricter, that if employees were 5 minutes late, they could receive a warning and on the third tardy, it would be "goodbye." (In this regard, Guadalupe Arteaga understood Elioff to be speaking of what would occur if employees were in the Union.) Elioff said medical coverage under a union was no good; the union charged dues and could raise them when employees least expected it. She told employees it was better they not vote, as they would lose seniority and start from zero in bargaining. She said if employees went on strike, the company could subcontract the delivery work, naming the Schneider company as a likely prospect.

Employee witnesses recalled that at the second meeting, Elioff repeated much of the same information given in the first meeting. She also told employees Respondent was legally obligated only to pay them minimum wage and could subcontract the delivery work to Schneider. Elioff read aloud from news clippings of strikes in Tennessee where the companies replaced strikers, and workers got fired. Dominguez described her family's privations and loss of income when her husband's union had gone on strike. Elioff said that the Union would charge employees $500 a year, which could otherwise be used to buy food for the family. Respondent showed a video in which a driver told of his father's experiences with a union and advised employees to vote no.

At the third meeting, employee witnesses said, Respondent showed a video and representatives asked employees not to vote for the Union. Elioff said striking employees would not receive unemployment and could be replaced. All employee witnesses denied that Elioff had read from anything other than news clippings at the meetings, but I cannot accept their testimony in that regard. In her posthearing brief, counsel for the General Counsel concedes that Elioff "read from prepared scripts." I note that in meetings Respondent conducted with employees during the 2002 union election campaign, Elioff also read, although not verbatim, from scripts. *International Baking Co. & Earthgrains*, supra. The inability of employees who testified about the meetings to recall that Elioff read from scripts impacts negatively their reliability as witnesses.

Respondent introduced three scripts into evidence. Elioff, Medina, and Dominguez denied that in responses to questions, Elioff said drivers could lose their jobs or be fired. Dominguez testified that Elioff answered a question about drivers' wages up north by saying there were no guarantees, since, with a union, wages and benefits could go up or down, and that during a strike employees could lose benefits because they were not working. After taking into consideration the sketchiness of the various employee accounts and after assessing all testimony for reliability and consistency, I find that Respondent's witnesses, in this regard, testified clearly, unequivocally, and sincerely. I find that Elioff, for the most part, read to employees from printed scripts, and I credit Respondent witnesses' testimonies of her nonscripted statements. In pertinent part, Elioff's scripted remarks read as follows:

[9] Rick Medina is not related to Medina.

> The Teamsters have more strikes each year than any other union in the country. I repeat, the Teamsters have more strikes than any other union in the country. Strikes with the Teamsters can happen two ways. If we don't agree with the Teamsters during negotiations of wages or other things, they can take you all out on strike. This is called a primary strike. Again, given our current financial situation, if the Teamsters win this election, you could find yourself in a position where if we refuse the Teamsters requests during bargaining they could call you out on strike.
>
> . . . .
>
> Always remember, economic strikers don't get paid, don't get benefits, don't get unemployment and can be permanently replaced by other employees or contract drivers.
>
> . . . .
>
> If the costs of delivering the products are more than the cost of using an outside transportation company, measures like they took in London [Kentucky] have to be *considered.* I am not saying that we have a plan in place in our bakery to outsource the driver jobs or that we would outsource the jobs if the Teamsters win the election. I repeat, I am not saying that we have a plan in place in our bakery to outsource the driver jobs or that we would outsource the jobs if the Teamsters win the election. All I am saying is that if production or delivery costs are not in line with earnings all options have to be considered.

In her posthearing brief, counsel for the General Counsel asserts that Elioff "admitted to telling [employees at the meetings] that under a union contract, there would be no flexibility in administering a disciplinary procedure because Respondent would end up with grievances." Presumably, counsel referred to the following testimony:

> Q. In [any of these three meetings] did you ever tell employees . . . that it would be easier to fire them if they voted in a union?
>
> A. No.
>
> Q. Did you talk about what would happen to them if they might be five minutes late getting to work?
>
> A. Yes . . . What I explained to them was unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we might end up with union grievances as a result of it. . . .

B. Suspension and Termination of Guadalupe Arteaga

By Guadalupe Arteaga's account, in the 2 years before the union organizational campaign began, Arturo Arteaga, whom he had known for 30 years and whom he considered a friend, engaged in "horseplay" at work by grabbing his buttocks. Guadalupe admitted that although he did not like the horseplay and did not think his supervisor should behave that way, he sometimes jokingly "returned" the conduct after Arturo instigated it or mimicked the conduct because he was angry about it. Guadalupe said he complained about it to Elioff, who said she would take care of it but did not.

One or 2 days after Respondent held its second union campaign meeting, Guadalupe Arteaga spoke with Oscar Lopez (Lopez) in Medina's office. Lopez, who said he was there from New Mexico to represent the company, told Guadalupe he was not telling employees to vote yes or no, but he reminded Guadalupe of what he had said at the meeting. Guadalupe told Lopez how Arturo Arteaga treated him: pressuring him, yelling at him, grabbing his private parts in front of others, assigning him the worst jobs, calling him the fat lady, stealing pallets from the company, and selling bread to the lunch truck proprietors. Lopez said he would report Guadalupe's complaints to management.

On January 12, Guadalupe Arteaga unloaded a trailer with Gemaro Bugarin (Bugarin), Arturo Arteaga's uncle. When the two finished the unloading, Guadalupe asked Bugarin to move the trailer, as was customary. Arturo intervened and told Guadalupe, "No, you're going to move it." Guadalupe asked why Arturo's "f— cousin" did not move it, as he always did. Arturo repeated his order, and Guadalupe agreed, saying he would first visit the restroom. Up to this point, the story is essentially undisputed. Witnesses disagree, however, as to what transpired after Guadalupe returned from the restroom.

According to Guadalupe Arteaga, upon his return to the loading area from the restroom, as he passed Arturo Arteaga, Arturo grabbed his testicles very hard from the front, "squeezing like never before." In considerable pain, Guadalupe wordlessly shoved Arturo away from him into some bread trays, ripping his jacket. Guadalupe's testimony at his April 5 unemployment hearing differs somewhat from his hearing testimony. Guadalupe testified in the unemployment forum that on April 5 when he was going toward the office to obtain his paperwork, Arturo Arteaga grabbed him, whereupon Guadalupe "turned around desperately" and in doing so, tore Arturo's jacket. Guadalupe's report to Zarco of what occurred also differs from his testimony. According to Zarco, Guadalupe telephoned her at home to ask her to write a letter describing the times she had seen him and Arturo playing around at work. Guadalupe told Zarco he needed the letter because of something that happened while he and Arturo were playing around. Guadalupe said he had grabbed Arturo from behind, and when Arturo in return had grabbed his genitals, Guadalupe had pushed him into a stack of trays.

Testifying for the General Counsel, Serrano said that he observed the confrontation as he was walking toward the exit door; he saw Arturo Arteaga grab Guadalupe Arteaga by the "balls," and Guadalupe shove him away by pushing his shoulder, after which Serrano turned away and left. In testimony given at Guadalupe's April 5 unemployment hearing, Serrano said that Arturo and Guadalupe "basically [stood] facing each other" when Arturo grabbed Guadalupe's "private parts." Serrano said he had never before seen Arturo touch any employee, including Guadalupe other than by slapping them on their shoulders or backs. Serrano's latter testimony is inconsistent with his January 12 written description of the event, which states, in pertinent part:

> I . . . have been witness and saw Arturo Arteaga . . . grab and push Jose Guadalupe Arteaga . . . grabbed him on the bud

> [sic].[10] It is not the first time that I have seen this before. Last time I seen this was on 1-11-2004.

According to Arturo Arteaga, after Guadalupe Arteaga angrily inquired why Arturo Arteaga's "f— relative" would not move the trailer, he ran toward Arturo, grabbed him by his neck, ripping his jacket, pushed him against the bread racks, and made a motion as if he would hit him.[11] Arturo asked what was going on, whether Guadalupe was crazy, and why he had done that to him. Arturo denied grabbing Guadalupe's private parts or fighting him in any way.

Respondent called two witnesses, who described what they had seen of the confrontation. William Quevado, shipping and receiving employee, heard Arturo Arteaga tell Guadalupe Arteaga to move a trailer as the two walked in front of him, but he did not hear Guadalupe's response, and he saw no physical contact, being turned away from the two. He did not pay enough attention to notice whether their voices were angry, but he heard cloth rip. Bugarin testified he went to the restroom immediately after Arturo Arteaga directed Guadalupe Arteaga to move the trailer and neither saw nor heard any further interaction between the two.

After their confrontation, Arturo Arteaga left the loading area and immediately telephoned his supervisor, Medina. He told Medina that Guadalupe had lunged at him, grabbed him by the throat, and pushed him against a rack of bread. He said his neck hurt, and Medina told him to go to the health clinic and to tell Manuel to tell Guadalupe he was suspended. Arturo then telephoned Elioff. While this was going on, Guadalupe moved the trailer, reported to the office and obtained his delivery papers from Arturo, who was talking on the telephone, and made his delivery. When Guadalupe Arteaga returned to the Vernon facility, Luis Magana and Manuel Arteaga told him he had to go home and return the next day to talk to Elioff. According to Guadalupe, he asked for permission to finish his 8 hours, to which Manuel Arteaga initially agreed but later refused, saying Respondent would say he was not doing his job properly. Guadalupe said that maybe he was already not doing his job properly because a driver named Bajaro had punched in and then gone to work another job. According to Guadalupe, Manual Arteaga said that Bajaro was not in the Union.

At some point following the Arturo/Guadalupe incident, Arturo Arteaga met with Elioff in her office. He told her that William Fierro Quevado, Nicolas Macias, and Bugarin had been working in the area at the time of the confrontation. He also told Elioff that although he had telephoned the police, he did not file a report because the police cautioned him that Guadalupe Arteaga could echo his accusation of assault, and the police would have to arrest him as well.

Elioff spoke to Nicolas Macias, who said that he was standing by the bread trays, that he heard something and noticed the trays move. Then he saw Arturo Arteaga, who showed him his torn jacket. Elioff also spoke to William Quevado, who said he was counting bread when he heard angry voices and ripping cloth. When he turned toward the sounds, he saw Guadalupe and Arturo Arteaga standing together before walking away in separate directions.[12]

At 11:09 a.m. that same day, Elioff informed Respondent's head office by e-mail that Guadalupe had "physically assaulted" Arturo, stating inter alia:

> My recommendation is immediate discharge. We have a custom and practice as well as a policy that an employee is discharged for [cause] whenever this has happened. We do not have a single employee who has ever gotten into a fight and has been given a warning or suspension. They have always consistently been discharged immediately after an investigation confirms this.
>
> In addition, I would like to point out the written documentation we have given several of these Class A Drivers due to their behavior as a result of them having voted in the union. They have been insubordinate, but we have treaded lightly towards them and merely given them something in writing. In my opinion we cannot afford to deviate from our custom and practice as well as policy of zero tolerance towards violence in the workplace.

When Guadalupe Arteaga went home, he telephoned union representative, Ruben Luna (Luna). The following day, the two returned to Respondent's facility at 11 a.m. Declining to permit Luna to participate, Elioff met with Guadalupe in her office and asked what had happened the day before. According to Guadalupe, he told her that Arturo Arteaga had grabbed his private parts and he had torn his jacket. Elioff accused Guadalupe of trying to hit Arturo, saying she had two witnesses but refusing either to name them or let Guadalupe see them. Guadalupe said he had witnesses too, and asked her to let him confront Arturo, which she refused. Guadalupe told Elioff that he and Arturo were just playing with each other and that Arturo was in the habit of playing with the employees. According to Elioff, Guadalupe told her that he and Arturo had been horsing around as usual, but this time Guadalupe had ripped Arturo's jacket accidentally. Elioff denied that Guadalupe had said anything about Arturo grabbing him, which is inconsistent with her testimony at the April 5 unemployment hearing, where she admitted that Guadalupe Arteaga had told her on January 21 that Arturo Arteaga had grabbed his private parts.

Elioff sent Guadalupe Arteaga home, saying she would call him later. A few hours later, Elioff called Guadalupe and told him he was fired.

With the purpose of proving that Arturo Arteaga had a propensity for physical sexual contact with employees, counsel for the General Counsel presented witnesses to testify about Arturo's inappropriate behavior at work. Corroborated by Maria Zarco (Zarco), shipping and receiving employee, Guadalupe Arteaga testified that he saw Arturo show obscene photographs including two of Arturo in compromising positions with a scantily clad woman to Zarco and ask her if she would like to

[10] I take "bud" to be a misspelling of "butt."

[11] By gesture during his testimony, Arturo Arteaga demonstrated Guadalupe Arteaga's grabbing his jacket by its front-neck area.

[12] In a file memo regarding the incident dated January 12, Elioff stated that she interviewed Leopoldo Meza as a witness. At the hearing, Elioff testified that she had inadvertently substituted Leopoldo Meza's name for that of Nicolas Macias. Elioff did not interview Bugarin until June.

be the woman in the photographs.[13] Guadalupe also testified that Arturo sometimes grabbed his buttocks while telling Zarco to watch. Zarco testified that Arturo and Guadalupe played around a lot, grabbing each other's buttocks and genitals and pushing each other.[14] Daily, she saw Arturo touch other drivers' buttocks and genitals. On one occasion, Arturo told her to look inside a trailer where employee, Gustavo Diaz, sporting a bra and thong underwear, submitted to other drivers grabbing his privates.[15] According to Zarco, beginning in October 2003, Arturo embraced her from behind on two occasions and asked her out, all of which Arturo denied. Zarco said she complained to Dominguez that Arturo was bothering her. Dominguez told Zarco that if it happened again, she was to tell her. About 2 weeks later, Zarco also reported Arturo's behavior to Elioff. Elioff said she would take care of it. Both Dominguez and Elioff denied receiving any such complaints.

Along these same lines, driver Alex Padilla, testified that he had twice seen Arturo Arteaga touch Guadalupe Arteaga's buttocks both before and after the union election.[16] He also testified that in about June 2003, he had seen Arturo grab a female lunch truck proprietor from behind and simulate having sex. Driver Adalid Osorto recalled seeing Arturo Arteaga grab the proprietor's breasts from behind.[17] He also testified that he saw Arturo touch Guadalupe Arteaga's private parts, as well as Sanchez', and grab Guadalupe from behind, simulating a sex act.[18] Sanchez testified he saw Arturo inappropriately touch drivers who worked with him, particularly targeting Guadalupe by grabbing his buttocks or touching his anus. Sanchez agreed that Guadalupe also grabbed Arturo, saying the two "played with each other and also testified that he and other employees played around in the same way. Arturo Arteaga also called Guadalupe Arteaga "La Gorda" (the fat lady). The evidence shows that most employees had used the term as a nickname for Guadalupe for many years; there is no evidence the nickname originated with Arturo.

For his part, Arturo Arteaga denied inappropriately touching Guadalupe Arteaga. Respondent's witnesses, Hector Magana (Magana), senior shipping and receiving lead, Manuel Arteaga, Medina, Bugarin, and Arturo Arteaga's uncle, denied seeing him do so.[19] Although Medina admitted that Guadalupe complained to him that Arturo yelled at him, he denied that Guadalupe complained of inappropriate touching.

Respondent has a written sexual harassment prevention policy, which is contained within the handbook distributed to all employees and posted by the entrance into the production plant and in the lunchroom. Further, Elioff conducts yearly training among hourly employees regarding the policy.

C. Warning and Suspension of Felipe Serrano

Serrano was an active union supporter, serving as the union observer at the union election in October 2003, and as shop steward thereafter.

On January 29, Respondent issued Serrano a final warning and suspended him for 7 days. Respondent's notice of warning read:

> A copy of this memo is being given to you for the purpose of clarifying your position with the company based on unacceptable behavior you have exhibited recently, not only with your fellow drivers, but with other company personnel as well.
>
> Previously, you were given a memo dated November 17, 2003 as a direct result of your continued volatile and intimidating behavior while at work. That memo directly referenced your unacceptable, discourteous, and abusive behavior towards a supervisor, which was witnessed by employees. . . .
>
> A second incident involved two fellow drivers. In that situation, you were once again verbally abusive, confrontational, antagonistic, intimidating and very disrespectful according to the information given by these drivers.
>
> The most recent incident occurred on January 26, 2004, and involved a warehouseperson in the Shipping & Receiving Department on Monday, January 26th. This display of unacceptable behavior was witnessed by several individuals. Based on the company's investigation of the incident, including witness interviews, it was determined that you were abusive, confrontational and antagonistic towards a fellow employee.
>
> Please be advised, however, that these are not the only cases of unacceptable workplace behavior which you have demonstrated.
>
> Therefore, consistent with the company's Global Business Practices standards regarding abusive and intimidating behavior, and based on the facts summarized above, coupled with our strict policy of zero tolerance towards any acts of violence, you are hereby on notice that any future incident of this nature will result in your immediate discharge from the company.
>
> Lastly, you are being suspended, without pay, for one week starting immediately.

[13] Copies of the photographs were put into evidence. Admittedly, the photographs were taken at a party attended by both Guadalupe and Arturo Arteaga. I find it unnecessary to resolve who took the pictures, who kept them, or how they were obtained for submission into evidence.

[14] According to Zarco's January 14 written description of this physical interaction, "other people that were not drivers would get in the game . . . [and] none of them would hide when they grabbed each others buttocks and their front part. . . ."

[15] Gustavo Diaz denied that he had ever, willingly or under coercion, worn the described garments at work. He did not seem a likely candidate for vulgar inanity, and I credit his testimony.

[16] In a letter he provided to Guadalupe Arteaga in January, Padilla described Arturo Arteaga's conduct with Guadalupe Arteaga as mutual joking around, saying, "they always treat each other too informally."

[17] Arturo Arteaga denied inappropriate behavior with Anna Doster, proprietor of the lunch truck with whom he was friendly and whom he occasionally hugged. Doster corroborated his testimony, and I find her credible.

[18] In a letter he provided to Guadalupe Arteaga in January, Osorto described Arturo Arteaga's conduct with Guadalupe as joking around and "struggling."

[19] Neither Magana's nor Bugarin's denial is entitled to any weight. The former did not work the same shift as Arturo Arteaga, and the latter admitted, under cross-examination, that Guadalupe and Arturo Arteaga touched and shoved each other, playing around like children.

The incidents alluded to in the warning notice refer to the following circumstances:

> November 17, 2003: Respondent issued a warning to Mr. Serrano on for making an obscene gesture and derogatory comments to his supervisor, Arturo Arteaga on November 16, 2003. There is no allegation this warning violated the Act.
>
> Incident involving two fellow drivers: This item relates to Mr. Serrano's exchange with Mr. Garcia and Mr. Maravilla, described above. According to Ms. Elioff, the two employees told her that Mr. Serrano had called them idiots for not attending union meetings. When the employees said they were not interested, Mr. Serrano became belligerent and cursed the two, one of whom cursed back.
>
> January 26, 2004: This item stems from a confrontation between Mr. Serrano and Mr. Magana. Mr. Magana testified that sometime around the end of January, shortly after he gave Mr. Serrano a direction to move a trailer, Mr. Serrano approached him in the presence of other employees and told Mr. Magana not to mess with him. When Mr. Magana denied having done so, Mr. Serrano said, "Don't mess with me; you don't know me."
>
> When Mr. Magana wanted to know if Mr. Serrano was threatening him and what he intended to do, Mr. Serrano said, "Keep it up, and you will see; you will regret it." Mr. Magana reported the incident to Mr. Medina and Ms. Elioff. The General Counsel does not allege that Respondent's consequent warning to Mr. Serrano violates the Act.

D. Suspension and Termination of Maria Zarco

Dominguez worked in Respondent's human resources office beginning in about 1989. Her duties included review of employee work authorization forms, including Employment Authorization Cards (work permits) issued by the U.S. Department of Justice, Immigration and Naturalization Service, some of which required annual renewal.

In 1994, employee Auria Chavez recommended that Dominguez hire Zarco, whom she described as her sister, and Respondent did so in October 1994. Then and later, Dominguez socialized with Auria Chavez and other employees who described themselves as sisters of Zarco and nationals of Mexico. Dominguez, as well as her supervisor, Elioff, assumed Zarco was also a Mexican national. Additionally, Elioff based her belief that Zarco was from Mexico on her recollection that the group, including Zarco, had at one time delegated one sister to go to Mexico to care for their ailing mother.

On April 18, 2002, Local 37 petitioned for an election among Respondent's production and maintenance employees at its Vernon facility. Zarco served as Local 37's observer at the election held July 9 and 10, 2002, which Local 37 lost by a large margin.[20] Following the election, Local 37 filed unfair labor practice charges and objections to the election. In August 2003, a hearing was held before an administrative law judge (ALJ) on the charges and objections, at which Zarco gave extensive testimony.[21]

All of Respondent's alien employees, including Zarco, were obligated by Federal law annually to obtain and provide to Respondent employment authorization documents. Respondent maintained a "tickler" system designed to alert its human resource department to work permit expirations due to occur within 90 days so that the staff could remind employees of their documentation responsibilities. Respondent conducted monthly reviews of the tickler file and gave reminders to employees as indicated.

Copies of work permits bearing Zarco's picture, name, and signature, for the years 1998–1999, 2000–2001, 2001–2002, and 2003–2004 were received into evidence. Each showed "Country of Birth" as "Guatemala." According to Dominguez, during her yearly reviews of Zarco's employment authorization cards, she failed to notice that the cards named Guatemala as Zarco's country of birth and never asked Zarco where she had been born. After Respondent reduced human resource staffing in 2001 or 2002, Dominguez' supervisor, Elioff, began to assist Dominguez in reviewing employee work permits, as needed.

In January 2004, while performing the monthly tickler file review, Elioff saw that Zarco's work permit was due to expire in 90 days. Consistent with Respondent's common practice, Elioff reviewed Zarco's permit[22] and noticed the country of origin stated thereon was Guatemala. As Elioff believed Zarco was from Mexico and not Guatemala, she decided to obtain an explanation.

According to Zarco, on January 13, the day after Respondent terminated Guadalupe Arteaga, Magana, in the presence of Manuel Arteaga asked Zarco what she would say if anyone asked her if Arturo Arteaga played around with the drivers. She answered that it was the truth that Arturo played around with the drivers.[23]

The following morning, January 14, Zarco was called to Elioff's office. Zarco testified that Elioff told her she was aware Guadalupe Arteaga was asking some employees to write letters supporting his claim that he had problems with Arturo Arteaga. Zarco said she had not given him any letter but that she was thinking about whether to help him. Zarco reminded Elioff that she had complained of Arturo's conduct toward her. Elioff told Zarco that was something that had to resolve itself, adding that the people who wanted to help Guadalupe were going to end up in trouble. Zarco said she had not given Guadalupe any letter. Elioff said she was just telling her that people who helped him were going to end up in trouble. Elioff denied having any such conversation regarding Guadalupe Arteaga.

[20] The facts concerning Local 37's representation efforts and Zarco's participation therein are set forth in *Sara Lee Bakery Group d/b/a International Baking Co. & Earthgrains*, supra.

[21] On December 3, 2003, the ALJ, who largely discredited Zarco's testimony, issued his decision, finding Respondent had engaged in certain unlawful and objectionable conduct. By order dated June 25, the Board affirmed the administrative law judge's decision and directed that a second election be held. Ibid.

[22] Respondent routinely double-checked expiration dates by referring to the work permits consequent to occasional employee defensiveness about the reminders.

[23] Both Magana and Manuel Arteaga denied this exchange. As Zarco appeared to testify sincerely and forthrightly about the conversation, I credit her testimony.

According to Zarco, Elioff then changed the subject and told Zarco that while checking work permits nearing expiration, she had noticed an error on Zarco's work permit. Pointing to the word "Guatemala" that appeared under "Country of Birth" on Zarco's work permit, Elioff said, "There is a mistake—an error in your permit. It says 'Guatemala.'" Elioff told Zarco she should go to an attorney and see about fixing the error, giving her a week to do so. Zarco said she would see an attorney so he/she could check and see what the error was.

Elioff gave a different version of her and Zarco's exchange. According to Elioff, she pointed to the word "Guatemala" on Zarco's work permit and said, "But we all know you are from Mexico." Zarco replied that she had "fixed" her papers like a lot of other people have by saying they are from Guatemala.[24] Elioff interrupted Zarco, saying, "Please don't tell me anything more that is going to make me have to terminate you. I prefer to believe that the INS made a mistake on your work permit and therefore what I am going to need for you to do is go to the INS, let them know that this is an error on your work permit. What they most likely will give you is a letter to bring back to me confirming that they are going to rectify [the error] and I will be able to have you come back to work."

Later that day, Zarco wrote the letter Guadalupe Arteaga had requested, describing her observations of Arturo Arteaga's conduct with the drivers. Regarding Elioff, Zarco wrote:

> . . . And now with the problem that happened with Arturo and J. Guadalupe they threaten to fire me if I say something of what I know. Irma Elioff has threatened me with calling immigration so they can deport me because that has always been the threat and since I told them that I was only going to say the truth and not lies she then told me that she gave me one week to put my documents in order and if not she would have to fire me and call immigration, and the motive was that I did not want to collaborate with her she was also not going to do it with me. She said that J. Guadalupe for having lied with respect to the Union would have to leave and all the people that were on his side. And for me to think about it and I had a week to do so. . . .

The next day, January 15, Zarco spoke to Alberto Salas (Salas), an assistant in the office of Frank Carvajal, an immigration attorney who had previously assisted Zarco in obtaining her work permit. Zarco told him of her meeting with Elioff. Salas asked what the error was, and Zarco said it was in the place on the card where "Guatemala" was printed.[25] Salas checked on his computer and said it was no error; the current card read the same as previous cards. Salas wrote the following letter, which reads, in pertinent part:

> We have handled the legalization of Maria Zarco Amaya, a native of Guatemala. It is my understanding that an employer may ask for a valid work permit and verify the permit. *You are free to do so.* I do not understand why anyone would have any doubts about the validity of her work permit. Any other type of inquiry is unusual and probably not allowed by law. . . . Please also read the notice from the BCIS on unfair employment practices on immigration related matters.

On the following Monday afternoon, Zarco presented the letter to Elioff, explaining that Salas said there was no mistake regarding Guatemala. According to Zarco, Elioff said she would call immigration and asked if Zarco would answer their questions. When Zarco agreed to do so, Elioff changed her mind. Telephoning Salas instead, she angrily spoke to him in English, which Zarco does not understand. At the conclusion of the conversation, Elioff told Zarco her attorney was committing fraud by putting Guatemala on her work permit, as she knew Zarco and her sisters who also worked at the Vernon facility were from Mexico. Zarco said the employees Elioff referred to were not her sisters but her cousins, whom she called sisters because they grew up together, and that she, herself, was born in Guatemala.[26] She said that if Elioff had asked where she was from, she would have told her, without wasting her time getting a letter. Elioff asked why Zarco had not told her she was from Guatemala. Zarco told Elioff she had never asked her and suggested she call immigration. Elioff said she would call INS the following day.

Elioff's version of what transpired between her and Zarco that day is significantly different. Elioff said that she told Zarco the letter from Salas was not what she needed; rather, she required a letter from the INS stating they would rectify the error on Zarco's work permit, which stated she was from Guatemala, to correctly read that she was from Mexico. Elioff then telephoned Salas and told him essentially the same thing, after which, utilizing the speaker feature of the telephone while Salas was still listening, she translated what she had told him to Zarco. When she had finished, Salas said, "That is fine," and they terminated the conversation.

The hearing was continued from April 7 to May 23, 2005, to permit Salas to testify. Concerning his January 15 conversation with Elioff, Salas said he told Elioff how she could verify the validity of Zarco's work permit. Elioff told him that she did not question the validity of the work permit but said she knew Zarco was Mexican, not Guatemalan. Salas told Elioff that at some point Zarco had to have presented evidence to INS that she was from Guatemala, which evidence had apparently satisfied INS. He suggested that Elioff speak to INS if she doubted the veracity of the evidence. He told Elioff that the company's only legal obligation was to copy Zarco's work permit and keep it on file, but if she felt the company had to do more, a letter to

[24] A consequence of the Nicaraguan Adjustment and Central American Relief Act (NACARA) was that certain Guatemalans, inter alia, were eligible for more favorable immigration treatment than Mexican citizens, which could arguably provide a motive for misrepresenting country of origin.

[25] Salas' testimony in this regard did not corroborate Zarco's. Salas testified that Zarco told him her supervisor was saying that Zarco was not Guatemalan.

[26] At the hearing, Zarco denied her country of origin was Mexico. I declined to permit Respondent to adduce additional evidence regarding Zarco's origin and her immigration status. The relevant evidence is what Respondent believed regarding Zarco's status at the time of her termination and whether it held the belief in good faith or was motivated by considerations unlawful under the Act. Ascertaining Zarco's actual status months after her discharge neither establishes Respondent's motive nor significantly bears on credibility.

INS would cover the company's obligations. Elioff told Salas that Respondent was going to fire Zarco for falsifying immigration documents because the company could get into trouble.[27]

I have carefully considered all relevant testimony in determining whether to accept Zarco or Elioff's account of their conversations. Zarco testified, essentially, that she did not understand Elioff doubted the accuracy of Zarco's stated country of origin. Yet, by Zarco's account, Elioff specifically pointed to "Guatemala" as being erroneous. Moreover, Salas testified that Zarco told him she was having trouble with a supervisor at work who said Zarco was not Guatemalan. It is not plausible that Zarco did not comprehend Elioff's concern, and her implausible testimony on this point reflects poorly on her credibility. Further, Zarco's written account of her conversation with Elioff differs significantly from her testimony at the hearing. In her January 14 letter, Zarco recounted neither Elioff's statement that she knew employees were writing letters supporting Guadalupe nor her threat that all employees who helped Guadalupe would end up in trouble, both of which details are so noteworthy that it is unlikely Zarco would have neglected to include them in her letter had the statements been made. Zarco wrote, essentially, that Respondent had threatened "to fire [her] if [she said] something of what [she] knew," but that is also not consistent with Zarco's testimony. Given these inconsistencies, I cannot accept Zarco's testimony of her conversation with Elioff, and I accept Elioff's account.

On Thursday, Elioff telephoned Zarco and told her the company attorneys had decided she should be fired. According to Elioff, she told Zarco that Respondent could not allow her to work knowing that her work permit was not legal. Thereafter, Respondent sent Zarco a termination notice dated January 22, in which the reason for termination noted, "Voluntary Resignation."[28]

V. DISCUSSION

A. Independent Violations of Section 8(a)(1) of the Act

1. Legal principles

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization, or promise benefit for not doing so, interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB 619 (2004); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001).

The Board has adopted a totality-of-the-circumstances test in determining whether questioning of an employee constitutes unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board also considers the following criteria called "the Bourne factors:"[29]

> (1) Background, i.e. history of employer hostility and discrimination.
>
> (2) Nature of information sought, e.g. on which to base employment action.
>
> (3) Identity of the questioner, i.e. place in company hierarchy.
>
> (4) Place and method of interrogation, e.g. casual or formal.
>
> (5) Truthfulness of the reply.

Ultimately, the Board's task is to "determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the [questioned] employee so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 940 (2000). The interrogation occurring herein is evaluated under those standards.

It is unlawful under Section 8(a)(1) of the Act for an employer to create an impression that it is watching or monitoring its employees' protected union activity, or in other words, to create an impression of surveillance. The underlying premise is that employees should be free to participate in union activity without fearing that members of management are peering over their shoulders, noting who is involved in union activities and to what extent or how. "'[T]he test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance.' *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999)." *St. Thomas Gas*, 336 NLRB 711, 719–720 (2001). It is not necessary that employees attempt to keep their activities secret to create a violation, and it is not necessary that the employer's words indicate the information has been obtained illegally. *Grouse Mountain Lodge*, 333 NLRB at 1322–1323.

2. Supervisory conduct

A. Arturo Arteaga violated Section 8(a)(1) of the Act by the following conduct:

1. In September 2003, asking Guadalupe Arteaga if he had signed a union card, saying he knew seven drivers had and that he had been told one of the signators was named "Arteaga." Arturo's statements constituted unlawful interrogation and unlawfully created the impression of surveillance.

2. On later occasions, by directing Guadalupe Arteaga to tell him if he knew anything about the Union and to tell him which employees had "voted" for the Union, engaging in unlawful interrogation and unlawfully requesting employees to report

[27] Although Salas could not, at the hearing, independently recall Elioff's having made that statement, he confirmed that he had so attested to a Board agent during the investigation stage of this matter and that subsequent illness and medication had affected his recall.

[28] Although Respondent contends Zarco resigned, clearly Respondent terminated her.

[29] First set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

to Respondent the union activities of other employees. *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004); *Fixtures Mfg. Corp.*, 332 NLRB 565 (2000).

3. Telling Guadalupe Arteaga that even if employees had not "signed," they would have to leave, thereby threatening reprisals for union activity.[30]

B. Sara Dominguez violated Section 8(a)(1) of the Act by the following conduct:

1. Prior to the October election, asking Guadalupe Arteaga if he knew something about the Union, which constituted unlawful interrogation.

2. Impliedly threatening Guadalupe Arteaga with unspecified reprisals by conjoining a comment on his seniority and his "decent" pay rate with an admonition that the Union would harm him and that it would be better for him not to sign a union card. It is reasonable to conclude that Dominguez' statement must have conveyed a message that union support would negatively impact Guadalupe's seniority and pay level. See *Reno Hilton*, 319 NLRB 1154, 1155 (1995). Dominguez gave Guadalupe no explanation as to how supporting the Union might harm him, leaving him to infer that the harm might arise from subjective factors within Respondent's control.

C. Manuel Arteaga violated Section 8(a)(1) of the Act by the following conduct:

1. Prior to the October election, asking Guadalupe Arteaga and Sanchez if they knew which employees had signed union cards.

2. Informing the two employees that Respondent would outsource their work. Although Respondent's later outsourcing of its delivery work may have been lawful, Manuel Arteaga's suggestion to employees that it was linked to their union activities is coercive even if his statement were untrue. Moreover, the statement evidences Respondent's hostility toward employees' union activities. *Paragon Pattern & Manufacturing Co.*, 342 NLRB 167 (2004).

3. Telling Guadalupe that he knew who the union leader and the card signers were created an impression of surveillance.

4. Admonishing Sanchez not to "do wrong by us," in the upcoming election unlawfully equated loyalty to the company with opposition to the Union. The clear suggestion that voting for the Union would "wrong" Respondent is coercive and violates Section 8(a)(1) of the Act.

5. Following the election, telling Guadalupe he knew how he voted created an impression of surveillance.

D. Jesse Medina violated Section 8(a)(1) of the Act by the following conduct:

1. On various occasions, set forth above, asking Guadalupe Arteaga if he knew anything about the Union and adjuring him to tell the truth about any involvement, all of which constitutes unlawful interrogation.

2. Telling Guadalupe that he knew he was comfortable in his job and that he should think about the Union, as it was not a good thing. By linking Guadalupe's current job comfort with abstention from union adherence, Medina impliedly threatened Guadalupe with unspecified reprisals, as the reasonable inference to be drawn from his statement was that union support would disturb Guadalupe's contentment.

3. On various occasions, asking Serrano who organized the drivers and soliciting him to find out who wanted the Union and who had signed authorization cards, all of which constitutes unlawful interrogation.

4. Prior to the election, telling Serrano not to invite other employees to a union meeting, under penalty of adverse consequences, thus interfering with Serrano's Section 7 rights.

E. Irma Elioff did not violate the Act by her cross-examination of Serrano at the unemployment hearing:

Counsel for the General Counsel argues that a cross-examination question posed by Elioff to Serrano during the course of Guadalupe Arteaga's unemployment hearing constituted a threat of unspecified reprisals against Serrano for having testified in support of another employee's unemployment insurance claim. Elioff asked Serrano if he was, at that time, in "final warning" status, which he was. While such a question could be viewed as a reminder to Serrano that he was on shaky disciplinary ground with Respondent and had better mind how he testified, Elioff asserts that her intent in asking the question was solely to bring to the unemployment ALJ's attention the fact that Serrano arguably had reason to be disgruntled with Respondent. There is no evidence Respondent otherwise threatened or coerced any employee in connection with his/her testimony at the unemployment hearing, and there is no evidence to justify ascribing to Elioff any improper motivation in raising a legitimate credibility issue in that forum. Accordingly, I conclude the General Counsel has not proved Elioff engaged in 8(a)(1) conduct in this instance, and I shall dismiss this allegation of the complaint.

F. Statements made in Respondent's preelection meetings with drivers:

In examining union campaign statements made by an employer to its employees, neither the subjective reactions of employees nor the intent of the speaker are determinative in finding 8(a)(1) violations. *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999); *Swift Textiles*, 242 NLRB 691 fn. 2 (1979). Rather, "the issue is whether objectively . . . remarks reasonably tended to interfere with the employee's right to engage in [a] protected act." *Southdown Care Center*, 308 NLRB 225, 227 (1992). As noted above, I have credited the testimony of Elioff, Medina, and Dominguez regarding what was said at employee meetings. The General Counsel asserts that even disregarding employee testimony, Respondent's evidence proves that Respondent unlawfully conveyed to its drivers the message that, "one way or another, either by strikes, the collective-bargaining agreement or by subcontracting, employees would lose their jobs if the Teamsters Union won the election." Counsel for the General Counsel's censure of Elioff's preelection statements is three-pronged: (1) the statements threatened the likelihood of future union-called strikes and concomitant job loss if employees selected the Union; (2) the statements threatened outsourcing of product delivery if employees selected the Union; (3) the statements threat-

[30] Counsel for the General Counsel argues that Arturo Arteaga also interrogated Sanchez. I have not accepted Sanchez' testimony to that effect. I have found only that Arturo Arteaga told Sanchez to be careful whom he voted for. Such an admonition, without any accompanying intimation of harmful consequences, is not coercive.

ened adherence to an inflexibly punitive disciplinary system upon negotiation of a union contract.

As for Elioff's statements concerning strikes, the script shows she accused the Teamsters of striking more frequently than any other union in the country and explained that strikes can occur when a company and a union do not agree to contract terms during negotiations. Elioff did not imply the company would not conduct contract negotiations in good faith or that the union would have to strike to gain reasonable demands, or that union representation would inevitably lead to strikes and job loss. Rather, it appears that Elioff accurately outlined what may occur when an employer and a union reach valid impasse during bargaining. The Board has approved campaign language that discusses the economic realities of the bargaining process. *J. R. Wood, Inc.*, 228 NLRB 593, 593–594 (1977). Applying the Board's *Southdown* standard to her remarks, I cannot find that Elioff's description of strike potential or consequences unlawfully interfered with employees' Section 7 rights.

A threat to outsource or subcontract work because employees elect to be represented by a union is unlawful. *MPG Transport, Ltd.*, 315 NLRB 489 fn. 1 (1994). As for Elioff's statement concerning delivery outsourcing, she neither threatened that Respondent would predicate outsourcing on employees' representational decision nor suggested that outsourcing would be accomplished without reference to any elected representative. She merely notified the drivers that Respondent would consider the costs of in-house versus subcontracted delivery and that delivery as well as production costs had to correlate to earnings, a fundamental facet of entrepreneurial planning, which could not reasonably have surprised or alarmed employees. I do not find Respondent's stated intention to consider lawful economic strategies in operating its business violated Section 8(a)(1) of the Act.

Finally, Elioff told employees, essentially, that if a future union contract contained a disciplinary procedure, Respondent would have to adhere to it even for such minutiae as reporting for work 5 minutes late. Viewed objectively, this statement carries with it both an implied promise (continuation of the current, presumably flexible, disciplinary approach if the drivers rejected the Union) and an implied threat (conformity to strict disciplinary procedures if the drivers chose union representation). I find, therefore, that Elioff's statement regarding the potential impact of a contractual disciplinary procedure violated Section 8(a)(1) of the Act.

B. Suspension and Termination of Guadalupe Arteaga

Respondent's motivation in suspending and terminating Guadalupe Arteaga on January 12 and 13, respectively, is in dispute. In resolving that issue, the Board's analytical guidelines in *Wright Line*,[31] control. If the General Counsel's evidence supports a reasonable inference that union activity was a catalyzing factor in Respondent's suspension and subsequent discharge of Guadalupe Arteaga, he has made a prima facie showing of unlawful conduct. "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [Citation omitted]." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). If the General Counsel establishes these four elements, the burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of protected activity.[32] *Avondale Industries*, 329 NLRB 1064 (1999); *T & J Trucking Co.*, 316 NLRB 771 (1995).

The evidence herein clearly establishes that Guadalupe Arteaga was an active union supporter. As evidenced by the supervisory violations of Section 8(a)(1) detailed above, Respondent bore animosity toward its drivers' union activities. Through interrogation, Respondent's supervisors made repeated efforts to ascertain the identities of the union proponents among the drivers. By creating the impression of surveillance and by making veiled threats of reprisal, Respondent's supervisors also tried to quell union support. Following the election, Respondent learned that Guadalupe Arteaga had, indeed, voted for the Union when he admitted as much to Manuel Arteaga, fellow supervisor of and cousin to Arturo Arteaga. Moreover, Guadalupe Arteaga professed to have done so in hope of obtaining better treatment from Arturo Arteaga, whose later complaint formed the basis for both suspension and discharge. It is reasonable to infer that Arturo Arteaga might bear particular animosity toward Guadalupe Arteaga who had, prior to the election, consistently denied union participation in response to Arturo's questions. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to suspend and terminate Guadalupe Arteaga. *American Gardens Management Co.*, supra.[33] The burden of proof therefore shifts to Respondent to show that Guadalupe Arteaga's termination would have (not just could have) occurred even in the absence of his union support. *Avondale Industries*, supra at 1066.

In assessing Respondent's evidence of lawful purpose in suspending and terminating Guadalupe Arteaga, I recognize the fact that an employer's desire to retaliate against an employee or to curtail protest does not, of itself, establish the illegality of

[31] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[32] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. *McCormick on Evidence*, at 676–677 (1st ed. 1954).

[33] I do not agree with the General Counsel that Elioff's January 12 e-mail to headquarters evidenced animus. Elioff referred to having "treaded lightly" in cases of driver insubordination that had resulted from their "having voted in the union." It does not follow that because Respondent may, accurately or inaccurately, have perceived negative postelection alteration in some employees' behavior, it therefore bears animosity toward union activity.

a termination. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries*, supra; *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). The correlative canon, of course, is that if an employer's motive is unlawful, it is immaterial that a legitimate reason for dismissal may exist. *E & L Transport Co.*, 331 NLRB 640 (2000). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. Ibid.

Two questions must be answered to permit an informed determination of Respondent's motivation: (1) Did Arturo Arteaga truthfully report the facts of his January 12 confrontation with Guadalupe Arteaga to upper management; and, as a corollary question, if not, did he misreport the incident because of his animosity toward Guadalupe's union activities?[34] (2) Even assuming Arturo accurately recounted to management what had occurred between him and Guadalupe, did Respondent suspend and terminate Guadalupe because he assaulted Arturo or because he had supported the Union in its recent and successful representation bid?

In considering whether Arturo Arteaga accurately reported his January 12 confrontation with Guadalupe Arteaga, I have carefully examined all accounts of the incident. I note that Arturo has consistently held to his version of what occurred, while Guadalupe has given inconsistent accounts. Thus, Guadalupe testified that he did not attack Arturo but only reacted to Arturo's vicious and unprovoked frontal assault on his testicles; yet his unemployment testimony suggests that Arturo assaulted him from behind whereupon he "turned around desperately," and he told both Elioff and Zarco that he and Arturo were playing around at work, adding to Zarco that he initiated first contact by grabbing Arturo from behind. Guadalupe's corroborating witness, Serrano, also gave inconsistent reports at the hearing, Serrano said he saw Arturo grab Guadalupe by the "balls, which was essentially consistent with his testimony at Guadalupe's unemployment hearing, but in a contemporaneous written account, he wrote that he saw Arturo grab Guadalupe on the butt. Moreover, Serrano's unemployment testimony of Arturo and Guadalupe facing each other at the time of Arturo's attack did not agree with Guadalupe's instant testimony that Arturo was at his side when he assaulted him. Given the vacillatory testimony of the General Counsel's witnesses regarding the January 12 confrontation between Arturo and Guadalupe Arteaga, I cannot accept their accounts. Accordingly, I give weight to Arturo Arteaga's testimony of what occurred. Since I find that Arturo Arteaga did not attack Guadalupe Arteaga, it is unnecessary for me to consider those cases in which the Board and the courts reject misconduct defenses where the employer provokes an employee to the point where he commits an indiscretion and then relies on his conduct to terminate him. See, e.g., *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). In light of this finding, I also find it unnecessary to determine whether Arturo had a proclivity for unseemly sexual interaction with others.

My conclusion that Arturo Arteaga did not attack Guadalupe Arteaga does not end the matter, however; it still must be determined whether Respondent actually suspended and terminated Guadalupe because he assaulted Arturo, or whether animus toward Guadalupe's union activities motivated Respondent to seize upon the incident to rid itself of a union supporter.

Direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001); *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *Shattuck Denn Mining Corp., 362* F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,[35] abruptness of the adverse action,[36] timing,[37] failure to conduct a full and fair investigation,[38] disparate treatment,[39] and/or departure from past practice.[40] There is no overt evidence of union animus directed specifically toward Guadalupe Arteaga, but circumstances, as described above, exist from which it is reasonable to infer animus. However, no suspicious timing exists herein. Guadalupe's union activity attracted supervisory attention prior to the October 2003 election, but there is no clear evidence that Respondent continued its antiunion conduct thereafter. While Respondent's action in suspending and terminating Guadalupe was certainly abrupt, the immediacy of it is reasonably explained as a justifiable reaction to an employee's assault on his supervisor. Further, there is no evidence of disparate treatment or departure from past practice. Respondent has, at all relevant times, had a zero-tolerance-for-violence policy, and there is no evidence Respondent disregarded or minimized that policy.

Counsel for the General Counsel argues that Respondent evidenced discriminatory motivation by conducting a cursory investigation of Arturo and Guadalupe's confrontation. While Elioff did not interview every potential witness, there is no evidence Respondent sought to shape or distort its inquiry or engaged in sham fact gathering. And while it is also true Elioff refused to identify Respondent's witnesses for Guadalupe or to let him confront Arturo, ". . . it is not the province of the Board to assure that employees can confront their accusers. An employer's failure to accord an employee this asserted 'right' does not establish a discriminatory motive." *Chart-*

[34] In the latter situation, even if Respondent relied in good faith upon Arturo Arteaga's report, Guadalupe Arteaga's discipline would violate the Act, as Respondent is bound by the acts of its supervisor, e.g., falsely accusing an employee of misconduct in retaliation for his union activities. *Dobbs International Services*, 335 NLRB 972, 973 (2001).

[35] *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

[36] *Dynabil Industries*, 330 NLRB 360 (1999).

[37] *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003); *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 (2000).

[38] *Bonanza Aluminum Corp.*, 300 NLRB 585 (1990).

[39] *NACCO*, 331 NLRB 1245 (2000).

[40] *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

wells Compass Group, USA, Inc., 342 NLRB 1155 (2004). Respondent provided Guadalupe reasonable information regarding the nature of his misconduct, and, although interviewing the subject employee is not a requirement for an adequate investigation,[41] gave him an opportunity to tell his side of the story. Counsel for the General Counsel also asserts that Elioff's refusal to permit Guadalupe to have union representation during her interview with him is evidence of "profound hostility to the Union campaign." Respondent had no legal obligation to admit a union representative into the interview, and I cannot infer animus from Elioff's declining to do so.

Counsel for the General Counsel further contends that Elioff's January 12 e-mail to headquarters showed a close-minded determination to terminate Guadalupe Arteaga regardless of what any investigation showed, which obduracy reveals unlawful motivation. However, Elioff prepared the e-mail after having spoken to Arturo Arteaga and another employee about the incident. From their accounts, she had initial knowledge of what had occurred, and no valid reason has been shown why Elioff should not have believed Arturo's account. See *American Thread Co.*, 270 NLRB 526 (1984). She was, therefore, entitled to give a preliminary recommendation as to disciplinary disposition of the matter. In short, neither Respondent's investigation of Guadalupe Arteaga's behavior nor its consequent termination proceeding evidences animus.

Finally, counsel for the General Counsel argues that discharge is an extreme penalty, which should not be applied to an otherwise exemplary employee. However, Respondent's action is not disproportionate to the offense even for a commendable worker. The Board has recognized that changes in the workplace environment require serious employer attention to potential workplace violence,[42] and Guadalupe Arteaga's discharge for violence toward his supervisor is neither unreasonable nor contrived. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Accordingly, I find Respondent met its burden of showing Guadalupe Arteaga's discharge would have occurred even in the absence of his union activities. Respondent did not, therefore, violate Section 8(a)(3) and (1) of the Act by discharging Guadalupe Arteaga.

C. Warning and Suspension of Felipe Serrano

Serrano was a high profile union supporter, serving as union observer at the October 2003 union election and as shop steward thereafter. The General Counsel contends that Respondent's January 29 warning to Serrano and his consequent 7-day suspension were motivated by its animus toward his union activities. The Board's analytical guidelines in *Wright Line*, supra, control. As explained in detail above, if the General Counsel's evidence supports a reasonable inference that union activity was a catalyzing factor in Respondent's warning and suspension of Serrano, he has made a prima facie showing of unlawful conduct. The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of protected activity.

With regard to the discipline given Serrano, it is undisputed that the General Counsel has established the first three of four elements the Board set forth in *American Gardens Management Co.*, supra, the General Counsel has shown that Serrano engaged in protected activity; the General Counsel has proved that Respondent was aware of Serrano's protected activity, and the General Counsel has shown Serrano suffered an adverse employment action. Respondent contends, however, that the General Counsel has not met the fourth element, i.e., establishing a motivational link, or nexus, between Serrano's protected activity and the discipline given him.

With regard to the fourth element, it is clear from Serrano's warning notice that Respondent based Serrano's discipline, at least in part, on certain of Serrano's union-related activity. The warning notice cites as one item of unacceptable workplace behavior the following:

> A second incident involved two fellow drivers. In that situation, you were once again verbally abusive, confrontational, antagonistic, intimidating and very disrespectful according to the information given by these drivers.

This incident referred to Serrano's September 2003 exchange with two other drivers in which he criticized their refusal of his invitation to attend a union meeting, perhaps disparaged their intelligence, and traded profanities with one of them. Respondent contends that Serrano's behavior to the two employees lost him the protection of the Act that he would otherwise have enjoyed in soliciting employees to participate in union meetings. The Board has stated that verbal abuse and profane language are not "an inherent part of Section 7 activity. [Citation omitted.]" *Lutheran Heritage Village*, 343 NLRB 646 (2004). The Board also recognizes that an employer may prohibit "abusive or threatening language" in a desire to maintain order and avoid liability for workplace harassment. An employer may not, however, exercise valid prohibitions so as to prohibit activity protected by Section 7. Ibid. The question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case. See *Atlantic Steel*, 245 NLRB 814, 816 (1979) (employee's use of abusive language may be unprotected depending on circumstances of case including nature of outburst); *Key Food*, 336 NLRB 111 (2001) (employee's profane and abusive tirade not so unreasonable in relation to the employer's provocation as to justify discharge); *Chartwells Compass Group, USA, Inc.*, supra (employer may not lawfully discipline an employee for making prounion statements that merely make another employee feel uncomfortable.)

The pertinent question here is whether Serrano's September 2003 conduct was so egregious as to forfeit the protection of the Act. I find it was not. Serrano merely, and protectedly, invited coworkers to attend a union meeting. When they declined, his animadversion on their characters

[41] *Frierson Building Supply Co.*, 328 NLRB 1023 (1999).
[42] *IBM Corp.*, 341 NLRB 1288, 1290 (2004).

was neither extensive nor threatening. Although Serrano used profanity, as did one of the invitees, record evidence suggests the use of profane language among Respondent's drivers was commonplace and thus neither intrinsically intimidating nor opprobrious. See *Lutheran Heritage Village*, supra at fn. 7. While duplicative solicitations of unwilling coworkers might have constituted harassment,[43] Serrano did not persist in his invitation to the two employees or even repeat it. Accordingly, I find that Serrano's September 2003 conduct was protected, that Respondent's inclusion of that conduct in his warning notice violated Section 8(a)(1) of the Act,[44] and that the General Counsel has made a prima facie showing that Respondent violated the Act by warning and suspending Serrano on January 29. The burden of proof thus shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have imposed the same discipline without relying on the September 2003 incident.

Even excluding the September 2003 incident, Serrano's January 29 warning and suspension relied on cumulative misconduct, including a previous warning issued November 17, 2003 for "discourteous and abusive behavior towards a supervisor," and "abusive, confrontational and antagonistic" behavior toward leadman, Magana, on January 26. The General Counsel does not contend that the November 2003 warning notice violated the Act. As for the latter incident, the specifics of Serrano's January 26 confrontation with Magana are that he threatened Magana with implicit violence in front of other employees in response to what Serrano perceived as Magana's disrespectful finger-snapping manner of assigning him a task. The General Counsel does not contend, and I cannot find, that Magana's direction to Serrano was given so insultingly and provocatively as to justify Serrano's response. See, e.g., *NLRB v. M & B Headwear Co.*, supra. Therefore, it is undisputed that Serrano engaged in misconduct on both occasions. Respondent argues that it would have issued Serrano the warning and suspension based solely on his November 2003 and January 26 misconduct, as both related to disrespect for and an undermining of Respondent's authority in directing its employees.

As noted above, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, supra, and cases cited therein. While trivial and insubstantial misconduct resulting in discharge may raise a "strong inference of retaliatory motive,"[45] Serrano's November 2003 and January 26 conduct cannot be considered either trivial or insubstantial. Each incident showed significant disrespect for employer authority, the latter involving potential workplace violence, a legitimate employer concern,[46] minimalization of which could result in calamitous consequences. Given the undisputed evidence that Serrano committed serious and similar infractions within a 2-month period, I find no basis on which to conclude Respondent would not have discharged him for those two infractions alone. See *Amber Foods, Inc.*, 338 NLRB 712, 717 fn. 16 (2002). Accordingly, I find Respondent met its burden of showing Serrano's discharge would have occurred even in the absence of his union activities and even in the absence of its unlawful inclusion of the September 2003 incident in his warning notice. Respondent did not, therefore, violate Section 8(a)(3) of the Act by discharging Felipe Serrano.

D. Suspension and Termination of Maria Zarco

The General Counsel contends that Respondent, on January 13 and 22 respectively, suspended and terminated Zarco in violation of Section 8(a)(4) of the Act because she testified at a hearing before the Board. Section 8(a)(4) makes it unlawful to discharge or otherwise discriminate against an employee because she has filed charges or given testimony at a Board proceeding. A *Wright Line* analysis applies in 8(a)(4) cases. *American Gardens Management Co.*, supra at 645.

To reiterate, under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action, and finally the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, ibid. Once the General Counsel has made the showings required above, the burden shifts to the Respondent to prove that it would have discharged the employee even in the absence of the protected conduct.

In August 2003, Zarco testified extensively at an unfair labor practice and objections hearing arising from Local 37's 2002 representation campaign and election among Respondent's production and maintenance employees.[47] Zarco was unquestionably engaged in activity protected by the Act when she testified, which establishes the first element of the *Wright Line* analysis. Respondent was well aware of Zarco's protected participation in the Board hearing, and that, coupled with Respondent's January suspension and discharge of Zarco, answers *Wright Line*'s knowledge and adverse employment-action elements. Thus, the General Counsel has met the first three elements of the *Wright Line* burden. However, the evidence herein does not so easily satisfy *Wright Line's* fourth element,

[43] See *Lutheran Heritage Village*, supra at fn. 13.

[44] Although the General Counsel did not specifically allege the inclusion of this incident in Serrano's warning notice as an independent violation of the Act, the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Atlantic Veal & Lamb, Inc.*, supra.

[45] Ibid. at 1171.

[46] *IBM Corp.*, supra.

[47] The administrative law judge's decision issued on December 2, 2003, generally discrediting Zarco's testimony, but finding Respondent had violated Section 8(a)(1) and (3) of the Act and had engaged in objectionable conduct, requiring a new election.

i.e., that "the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action." *American Gardens Management Co.*, ibid.

There is no evidence any supervisor or agent of Respondent ever expressed animosity toward Zarco for her August 2003 testimony against the company.[48] On January 13, the day following Guadalupe Arteaga's discharge, Magana, in the presence of Supervisor Manuel Arteaga, essentially questioned Zarco as to whether she would rally to Guadalupe's support.[49] It is reasonable to infer that Magana and Manuel Arteaga had Zarco's past willingness to testify against Respondent in mind when they sought to ascertain if she intended to support Guadalupe in his expected protest against his discharge, but there is nothing to suggest Respondent wished to retaliate against Zarco because of her past testimony. Moreover, while the questioning might arguably permit an inference of animus toward Zarco's potential support of another employee in a dispute over his discharge, it cannot support an inference of animus toward Zarco's past Board testimony. Accordingly, I find the General Counsel failed to meet his *Wright Line* burden of establishing a prima facie case that Respondent violated Section 8(a)(4) by suspending and terminating Zarco because she testified at a Board hearing.

My finding that the General Counsel has not made a prima facie case of Section 8(a)(4) does not dispose of the allegations concerning Zarco's suspension and discharge. The following questions remain: (1) Did Zarco's action in preparing a letter for Guadalupe Arteaga regarding Arturo Arteaga's conduct constitute concerted, protected activity within the meaning of Section 8(a)(1) of the Act? (2) If so, did Respondent suspend and terminate her because she did so?[50]

The Board has enunciated its "longstanding distinction" between concerted activity and mutual aid or protection, both of which tests must be met in establishing Section 7 coverage. *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). In *Holling Press*, an employee of the company filed a claim of sexual harassment against her supervisor, then appealed to coworkers to give supportive evidence, for which she was fired. In dismissing the complaint, the Board concluded the employee's efforts to garner support, while concerted, were made only to advance her personal issue. The Board stated that the element of concertedness

> [i]nclude[s] 'circumstances in which individual employees seek to initiate or to induce or to prepare for group action, [citing *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3d Cir. 1964)]' . . . and 'activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,' so long as what is being articulated goes beyond mere griping. [Citing *Meyers Industries*, 281 NLRB 882 (1986).]

The "mutual aid or protection" element, however, requires that the activity engaged in "benefit the group," [not] advance [an employee's] personal case . . . [and is shown when] the group of employees ha[ve] a common interest in the subject matter." *Holling Press, Inc.*, 343 NLRB at 303.

Applying *Holling Press*, it is clear Guadalupe Arteaga was engaged in activity, which, though "concerted," did not constitute "mutual aid or protection" when he solicited coworker statements in an effort to bolster his unlawful discharge claim. But it is not Guadalupe's activity that is at issue but Zarco's, and *Holling Press* does not answer the question of whether employees who support another employee in an employment dispute are thereby engaged in concerted activity for mutual aid or protection. The Board has, however, had occasion to rule on analogous activity. In *Cadbury Beverages, Inc.*,[51] one employee cautioned another against representation by an assertedly untrustworthy individual. The Board concluded that the employee's caution constituted protected concerted activities on behalf of another employee, and the employer violated Section 8(a)(1) of the Act by suspending him because of it. Extending *Cadbury* to Zorca's situation, I find that when she wrote a supportive letter for Guadalupe Arteaga, she engaged in concerted activity in aid and protection of a fellow employee, thus meeting both requirements of Section 7 coverage. Adverse employment action taken to quell or to interfere with her protected activity would constitute a violation of Section 8(a)(1) of the Act.

Having determined that Zarco's action in preparing a letter for Guadalupe Arteaga regarding his supervisor's conduct constituted concerted, protected activity within the meaning of Section 8(a)(1) of the Act, it remains to determine whether Respondent suspended and terminated Zarco because she engaged in the concerted, protected activity.

Respondent contends it did not terminate Zarco because of any protected activity. Rather, Respondent argues, it did so in compliance with the requirements of the Immigration Reform and Control Act of 1986 (IRCA), upon suspecting, in good faith, that Zarco's work permit was based on false information.

IRCA's prohibitions have been enunciated by the Supreme Court:

> [I]f an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. *§ 1324a(a)(2).* Employers who violate IRCA are punished by civil fines,

[48] Although counsel for the General Counsel presented some testimony that Respondent imposed more onerous work duties and conditions on Zarco after the 2003 hearing, the evidence was not well developed, and I cannot draw any inferences of animus from it.

[49] Manuel Arteaga's silence during this exchange constitutes supervisory acquiescence in the questioning, which is thus chargeable to Respondent.

[50] Although the General Counsel did not allege Zarco's suspension and termination independently violated Section 8(a)(1) of the Act, the employment actions were fully litigated, and Respondent would clearly have presented the same defense to an 8(a)(1) theory of violation as it did to the 8(a)(4) allegation. Accordingly, it is appropriate to consider whether Zarco's suspension and termination independently violated Sec. 8(a)(1) of the Act. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1178 (2004).

[51] 324 NLRB 1213 (1997), enfd. 333 U.S. App. D.C. 94 (D.C. Cir. 1998).

> *1324a(e)(4)(A)*, and may be subject to criminal prosecution, *1324a(f)(1)*. IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. *1324c(a)*. It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. *§§ 1324c(a)(1)–(3)*. Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. *18 U.S.C. § 1546(b)*.[52]

Clearly, Respondent was responsible for seeing that Zarco possessed acceptable documentation of authorization for employment in the United States. Whether Respondent was required to act upon its suspicion that Zarco's documentation (which had passed INS muster) was premised on inaccurate information is not so clear. Counsel for the General Counsel argues Respondent bore no such responsibility, pointing out that INS regulations "expressly allow Employers to rely on documents which on their face appear to be valid and relate to the person for whom they are issued"[53] and that Elioff "never thought [Zarco's work permit] was a fake document." In short, Counsel for the General Counsel appears to assert that Respondent is not only justified in turning a blind eye to possible documentation fraud but that Respondent's failure to do so signals pretextuality. Respondent, on the other hand, contends that "[o]nce Maria Zarco . . . informed [Respondent] that she was not lawfully authorized to work in the United States, because she had 'fixed' her paperwork, it had no choice but to terminate her or allow her to resign." Respondent offers no authority for this broad assertion, and its legal validity may be questionable. However, given the statutory and case authority regarding an employer's burden of compliance under IRCA, I find it was not unreasonable for Elioff, and presumably Respondent's corporate counsel whom she consulted, to conclude the company might risk civil and/or criminal liability by retaining an employee who they believed had deceptively obtained work authorization.

My finding that Respondent's concern with Zarco's immigration status was not so inconsequential as to constitute pretextuality does not, of course, end the inquiry. It remains to determine whether Respondent's suspension and termination of Zarco was motivated by validly held concerns or whether Respondent seized on suspected documentation improprieties to rid itself of an individual whose protected activity it disliked. As the Board, quoting *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981), noted, "the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *KOFY TV-20*, 332 NLRB 771, 772 (2000).

I have found that Elioff did not, as claimed, tell Zarco on January 13, that people who helped Guadalupe were going to end up in trouble. A direct threat is not, of course, the only method of proving that adverse employment action is unlawful. The timing of Elioff's meeting with Zarco, coming as it did almost immediately after Magana, in the presence of Manuel Arteaga, questioned Zarco about whether she would support Guadalupe Arteaga, creates at least a remote suspicion that Respondent's ensuing suspension and termination of Zarco was unlawfully motivated. However, a number of facts militate against such a conclusion. First, there is no evidence anyone reported to Elioff the substance of Magana and Manuel Arteaga's conversation with Zarco, and Zarco gave Elioff no indication she planned to write a letter for Guadalupe. Second, there is no evidence that Respondent bore animosity toward employee support of Guadalupe. Third, there is no evidence that Elioff deviated from normal practice in reviewing Zarco's work documentation. While Dominguez may have, inadvertently or otherwise, overlooked a discrepancy between the country of origin identified on Zarco's work permit and the one tacitly acknowledged in the workplace, there is no showing Elioff ever did so. Fourth, there is no evidence Elioff ever accommodated or overlooked any work permit inconsistency, so as to permit an inference that she treated Zarco disparately. Fifth, Elioff gave Zarco ample time to rectify any misunderstanding about her work permit or to verify its accuracy, which is inconsistent with a "rush to judgment" that can herald animus.[54]

Upon Elioff's inquiry into the accuracy of her work permit, Zarco did little to alleviate Elioff's concerns. The General Counsel argues, essentially, that Respondent's failure to take steps to ascertain the accuracy of Zarco's work permit demonstrates animus.[55] I cannot agree. Respondent had no duty to establish the validity of Zarco's work permit; that burden, as well as access to authenticating information, belonged to Zarco. Since Zarco knew Elioff doubted Guatemala was her country of origin, it is reasonable to expect Zarco would have explored the issue with Elioff immediately or at least defended the veracity of the permit if she believed it to be accurate. Elioff gave Zarco a week to straighten out the perceived "error" in her work permit. There was nothing to prevent Zarco from presenting substantiating evidence to Elioff to establish that no error existed in the work permit. Zarco did not do so. Rather she obtained a letter from Salas that did not address the accuracy of the information. Even after Elioff declined to accept Salas' letter as resolving the problem, she gave Zarco additional time to resolve the problem, which Zarco did not utilize. Zarco's unresponsiveness in the face of a patent threat to her employment could rationally be viewed by Respondent as confirmation that a problem with the work permit existed. In light of Respondent's reasonable belief that the integrity of Zarco's documentation was compromised, it is irrelevant that, as counsel for

[52] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 145 (U.S. 2002); see also *Collins Food International, Inc. v. U.S. Immigration & Naturalization Service*, 948 F.2d 549 (9th Cir. 1991); and *Mester Mfg. Co., v. I.N.S.*, 879 F.2d 561 (9th Cir. 1989).

[53] *Citing Handbook for Employers Instructions for Completing Form I-9 (Employment Verification Form)*, p. 8.

[54] See *Caesar's Atlantic City*, 344 NLRB No. 122 (2005).

[55] Actions the General Counsel suggests Respondent should have taken include contacting the BCIS, asking Zarco for documents such as birth certificate or passport, and inquiring into family relationships.

the General Counsel points out, Zarco's 10-year performance record is unblemished. While such evidence may counterbalance alleged misconduct, it is unavailing as a defense to improper alien work authorization documentation.

In sum, the evidence compels a conclusion that Respondent suspended and thereafter terminated Zarco because of perceived inaccuracy in her work permit and not because she engaged in concerted, protected activity.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by

(a) Interrogating employees about their or other employees' concerted, protected activities.

(b) Asking employees to report to management the concerted, protected activities of other employees.

(c) Creating the impression of surveillance of employees' union activities.

(d) Impliedly threatening employees with reprisals if they continue to engage in union or other protected activities.

(e) Equating voting for the Union with disloyalty to Respondent.

(f) Warning an employee not to invite other employees to a union meeting.

(g) Attributing possible outsourcing of work to employees' union or other concerted, protected activities.

(h) Impliedly promising to continue a flexible discipline policy if employees reject the Union.

(i) Impliedly threatening employees with a strict discipline policy if employees select the Union.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[56]

ORDER

Respondent, Sara Lee Bakery Group d/b/a International Baking Company and Earthgrains, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their or other employees' concerted, protected activities.

(b) Asking employees to report to management the concerted, protected activities of other employees.

(c) Creating the impression of surveillance of employees' union activities.

(d) Impliedly threatening employees with reprisals if they continue to engage in union or other protected activities.

(e) Equating voting for the Union with disloyalty to Respondent.

(f) Warning any employee not to invite other employees to a union meeting.

(g) Attributing the reason for possible outsourcing of work to employees' union or other concerted, protected activities.

(h) Impliedly promising to continue a flexible discipline policy if employees reject the Union.

(i) Impliedly threatening employees with a strict discipline policy if employees select the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its plant in Vernon, California, copies of the attached notice marked "Appendix."[57] Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, California July 29, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[56] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[57] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT ask any of you about your or other employees' activities on behalf of Freight, Parcel, Bakery, Dairy, Meat, Poultry, and Factory Workers in the Los Angeles Metropolitan Area; General Truck Drivers, Warehousemen and Helpers Los Angeles, San Bernardino, Riverside Counties, California; Agricultural And Related Product Workers in the California Counties of San Diego, Imperial, Orange, Alameda, Los Angeles, San Bernardino, Ventura, Santa Barbara, Kern, San Luis Obispo, Tulare, Kings, Monterey, San Benito, Fresno, and Merced, Local 63, International Brotherhood of Teamsters, AFL–CIO (the Union) or any other concerted, protected activities.

WE WILL NOT ask you to report to management about the union or other concerted, protected activities of other employees.

WE WILL NOT say anything to make you think we are watching your union or other concerted, protected activities.

WE WILL NOT say anything to make you think we are threatening you with reprisals if you engage in union or other protected activities.

WE WILL NOT say anything to imply you are disloyal to the company by supporting the Union or by engaging in any other concerted, protected activities.

WE WILL NOT warn you not to invite other employees to a union meeting.

WE WILL NOT say anything to make you think we will outsource work because of your union or other concerted, protected activities.

WE WILL NOT impliedly promise to continue a flexible discipline policy if you reject the Union.

WE WILL NOT impliedly threaten you with a strict discipline policy if you select the Union.

SARA LEE BAKERY GROUP D/B/A INTERNATIONAL BAKING COMPANY AND EARTHGRAINS